CHAPTER 1

VICARIOUS LIABILITY

In certain circumstances, for reasons which arise from justice and expedience, the law holds people *vicariously* responsible for the torts of others (*a*).

The first, and most obvious instance of vicarious liability arises where *one person* (*principal*) *expressly* (*b*), *or by implication* (*c*), *authorises another* (*agent*) *to commit an act which is, in itself, a tort.* Here, it is plain, on general principle, that "*Qui facit per alium facit per se*" (*d*) and, in such a case, both principal and agent (*e*) may be jointly and severally liable. All that need here be noted is that, in the law of torts, as in the law of contract, although in such circumstances the authorisation will usually be prior authorisation, this need not necessarily be the case. For "*omnis ratihabitio retrotrahitur et mandato priori aequiparatur*", and provided that—and only provided that—the tort is committed on behalf of the principal (*f*), he may render himself liable for it, equally with the agent, if he ratifies the commission of it by subsequent authorisation:—

(*a*) See on the whole subject Atiyah, *Vicarious Liability in the Law of Torts.*

(*b*) *Ellis* v. *Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767.

(*c*) A servant may, for example, be held to have *implied* authority to act on his master's behalf in an emergency: *Poland* v. *John Parr & Sons*, [1927] 1 K. B. 236. But see *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270, 290.

(*d*) This, like other Latin maxims, should, however, be quoted with caution for their repetition often obscures, rather than clarifies, meaning. See *Staveley Iron and Chemical Co., Ltd.* v. *Jones*, [1956] 1 All E. R. 403, 409; [1956] A. C. 627, 643; *per* Lord REID.

(*e*) The word "agent" appears to have no precise technical meaning in the law of torts (indeed, Street, *Torts*, p. 440, doubts whether a category of "agents" is proper in this branch of the law at all). It is here used to include anyone for whom another may be held vicariously responsible, and thus includes, *inter alia*, "servants" and "independent contractors".

(*f*) *Wilson* v. *Barker* (1833), 4 B. & Ad. 614; *Wilson* v. *Tumman* (1843), 6 Man. & G. 236; *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd., and Schmidt*, [1914] A. C. 197, 213.

"That an act done, for another, by a person *not assuming to act for himself, but for such other person*, though without any precedent authority whatever, becomes the act of the principal, *if subsequently ratified by him*, is the known and well established rule of law (*g*)."

ILLUSTRATION 126

One who authorises another to commit a tort may himself be held liable as principal.

McLaughlin *v.* Pryor (1842), 4 Man. & G. 48.

The defendant hired a carriage with postilions (who were the servants of the carriage owner) to go to the Epsom races. The defendant rode on the box, and, on the way to Epsom, encouraged the postilions to "cut in" upon the line of traffic ahead. In doing so they caused the carriage to collide with the plaintiff's gig, and he was injured. *Held:* Since, although the postilions were not the defendant's servants, he had both *encouraged their dangerous driving*, and had, at the time of the accident and afterwards, *held himself out as responsible for it*, he was liable.

But the incidence of vicarious liability is not limited solely to liability for torts which the principal *authorises*; for in certain circumstances he will be held liable for torts committed by his agent without his authority, provided that they are committed in the course of the things that the agent is authorised to do. This occurs in four kinds of circumstances. First, in certain circumstances connected with the driving of motor vehicles. Secondly, where a servant commits a tort in the course of his employment. Thirdly, where a partner commits a tort in the execution of the firm's business. Finally, where one person (principal) authorises another (agent) to do something in circumstances in which the law refuses to permit the delegation of responsibility. In this last case, the principal will be liable not only if the agent is someone who comes within any of the first three categories, but even if he is an independent contractor (*h*), (*i*).

(*g*) *Wilson* v. *Tumman* (1843), 6 Man. & G. 236, 242; *per* TINDAL, C.J. (italics ours). See also *Carter* v. *St. Mary Abbott's, Kensington Vestry* (1900), 64 J. P. 548; and for a useful discussion of principles, *Marsh* v. *Joseph*, [1897] 1 Ch. 213.

(*h*) The technical differences between "servants" and "independent contractors" will be explained below.

(*i*) The Crown is now liable for the torts of its servants or agents: Crown Proceedings Act, 1947, ss. 2 (1) (a), 2 (3), 38 (2) (6 Halsbury's Statutes (2nd Edn.) 48, 71).

1. SPECIAL LIABILITY ARISING FROM THE USE OF VEHICLES

Probably because the driving of motor vehicles is generally regarded as an extra-hazardous activity (*j*) there is a peculiar line of cases which imposes a special liability in negligence upon owners and users (*k*) of motor vehicles. This liability seems to arise neither from the master and servant relationship nor from the contract relationship, and to be something *sui generis*, though it is sometimes described in terms of agency (*l*).

It may apparently arise in at least three ways. First, where a car owner *delegates* the duty of driving to another as in *Parker* v. *Miller* (*m*) where the defendant when taking a friend and his daughter for a drive, got out of the car and asked the friend to drive the daughter home, thus delegating his own duty to the friend, and the defendant was held liable for the latter's negligence (*n*). Secondly, it may arise from the fact of ability to control the acts of the driver, as in *Samson* v. *Aitchison* (*o*) where a car owner was held liable for the negligence of the son of an intending purchaser whom he permitted to test the car while he (the owner) was in it. Thirdly, it may arise where the owner allows another to use his car "on the owner's business", as where the driver is "doing something for" (*p*) the owner. Thus an owner was held liable for the negligence of a driver who drove one of the former's cars to Monte Carlo while he (the owner) completed in another in the Rally (*q*).

On the other hand, the owner will not be held responsible for a

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(*j*) The very uncertainty of the principles here involved suggests that policy—as also in the case of motoring offences—whether it be regarded as wise or hysterical, dictates decision.

(*k*) See *Scarsbrook* v. *Mason*, [1961] 3 All E. R. 767—perhaps an extreme decision in which a passenger who was driven for hire was held responsible for the negligence of the driver.

(*l*) See *Ormrod* v. *Crosville Motors Services, Ltd.*, [1953] 2 All E. R. 753, 754; *per* SINGLETON, L.J.: *Scarsbrook* v. *Mason* (last note): *Norton* v. *Canadian Pacific Steamships, Ltd.*, [1961] 2 All E. R. 785, 790; *per* PEARSON, L.J. (though reliance at p. 789 on *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 829, seems to suggest that he equates the liability with that for independent contractors).

(*m*) (1926), 42 T. L. R. 408. And see *Smith* v. *Moss*, [1940] 1 All E. R. 469; [1940] 1 K. B. 424.

(*n*) See the explanation of this case in *Hewitt* v. *Bonvin*, [1940] 1 K. B. 188, 195; *per* DU PARCQ, L.J. And on the principle of delegation *Norton's Case* (above, n. (*l*)) at p. 790; *per* PEARSON, L.J.

(*o*) [1912] A. C. 844. See also *Wheatley* v. *Patrick* (1837), 2 M. & W. 650; *Pratt* v. *Patrick*, [1924] 1 K. B. 488.

(*p*) See *Ormrod* v. *Crossville Motor Services, Ltd.* (*Murphis, Third Party*), [1953] 2 All E. R. 753, 754; *per* SINGLETON, L.J.

(*q*) *Ormrod's Case* (last note). And see Illustration 127.

driver who uses his (the owner's) car for his *own* business (*r*) nor if he uses it under the authority of someone else (*s*).

ILLUSTRATION 127.

The car owner will be liable for the driver where the latter is "doing something for" him (*t*).

Carberry *v.* Davies, [1968] 2 All E. R. 817.

A car owner asked one of his employees to drive the owner's sixteen-year-old son about in the evenings in the owner's car. One evening there was an accident due to the employee's negligence. *Held:* The owner was liable. But the Court of Appeal seems to indicate that had the driver acted at the son's request and merely with the owner's permission the latter would not have been liable.

2. LIABILITY OF MASTER FOR TORTS OF SERVANT

Our law has long recognised (*u*) that a master must bear responsibility for the torts of his servant (*a*) committed in the course of his employment. The reasons given for the recognition of this form of vicarious liability have been various; but the truth seems to be that it is simply a rule of rough justice (*b*), which ensures that a person injured by a servant, who is unlikely himself to have the means to satisfy the claim, may have recourse against the longer pocket of the master; who, after all, has the benefit of the servant's work.

It is necessary first to explain the *nature of the relationship* which makes a person for this purpose the "servant" of another; and then, assuming that such a relationship exists, to examine the *circumstances in which* the "master" will be held vicariously responsible.

(a) Who is a Servant?

This is a question to which no universally valid answer can now be given.

At one time it was thought, in reliance upon the analogy of domestic service or of manual labour, that the "servant" could be distinguished from other kinds of agents by reference to the

(*r*) *Britt* v. *Galmoye and Nevill* (1928), 44 T. L. R. 294; *Hewitt* v. *Bonvin*, [1940] 1 K. B. 188—son allowed to drive father's car for his own purposes.

(*s*) *Chowdhary* v. *Gillot*, [1947] 2 All E. R. 541.

(*t*) See above, n. (*p*).

(*u*) It has not always done so. See Holdsworth, H.E.L.; Vol. II, 47; Vol. III, 382–5; Vol. VIII, 472–82.

(*a*) The master may have a right of indemnity against the servant (see p. 188, *supra*).

(*b*) "Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger": *Hern* v. *Nichols* (1700), 1 Salk. 289; *per* Holt, C.J.

degree of *control* exercised, or exercisable (*c*), over him by his employer. If the employer can control a man *as to the manner in which his work is to be done*, then, it was said, the man is a "servant" (*d*); otherwise he is not.

But such a comparatively simple test can now no longer be regarded as the sole criterion (*e*); for modern authorities have enormously extended the ambit of this branch of vicarious liability, so as to bring within the category of "servants" people who cannot, in any but the vaguest possible sense, be regarded as being subject to such control (*f*). Thus for example at one time, since they lacked this power of control, hospital authorities were held not to be vicariously responsible for the activities of their staffs involving professional care and skill (*g*). But this is no longer the law; and they may now be held liable not only for the negligence of nursing staff, but also for that of radiographers (*h*) in their whole-time employment, or resident house-surgeons (*i*), or even of whole-time assistant medical officers (*k*). Indeed, as Lord PARKER, C.J., said in *Morren* v. *Swinton and Pendlebury Borough Council* (*l*)

(*c*) Not merely "exercised", because, for example, a ship's master has always been treated as the "servant" of the owners. A chauffeur and a reporter on the staff of a newspaper are also "servants"; but a ship's pilot, a taxi-driver and a contributor to a newspaper are not. See *Stevenson Jordan and Harrison, Ltd.* v. *Macdonald and Evans*, [1952] 1 T. L. R. 101, 111; *per* DENNING, L.J.

(*d*) See *Pollock on Torts* (15th Edn.), pp. 62–3, and authorities there cited, and *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E. R. 491; [1942] A. C. 509.

(*e*) Though it is still a very important one: see *e.g. Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool), Ltd.*, [1946] 2 All E. R. 345; [1947] A. C. 1, 17.

(*f*) How many employers, one wonders, are capable of directing even the simpler operations of their employees?

(*g*) *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K. B. 820 (*nurses*, during operation not responsibility of hospital, since under surgeon's control); but contrast *Lindsey County Council* v. *Marshall*, [1936] 2 All E. R. 1076; [1937] A. C. 97, where the hospital *premises as such* were permitted to be in a dangerous condition.

(*h*) *Gold* v. *Essex County Council*, [1942] 2 All E. R. 237; [1942] 2 K. B. 293.

(*i*) *Collins* v. *Hertfordshire County Council* (Illustration 128) and casualty officers; *Barnett* v. *Chelsea and Kensington Hospital Management Committee*, [1968] 1 All E. R. 1068.

(*k*) *Cassidy* v. *Minister of Health*, [1951] 1 All E. R. 574; [1951] 2 K. B. 343. In *Roe* v. *Ministry of Health*, [1954] 2 All E. R. 131; [1954] 2 Q. B. 66, it was also accepted that hospital authorities may be held liable for the negligence of part-time anaesthetists; and in *Razzel* v. *Snowball*, [1954] 3 All E. R. 429, a part-time consultant was held to be sufficiently within the employment of a hospital authority to take advantage of the Limitation Act, 1939, s. 21 (1) (13 Halsbury's Statutes (2nd Edn.) 1180).

(*l*) [1965] 2 All E. R. 349, 351. And see *Whittaker* v. *Minister of Pensions and National Service*, [1966] 3 All E. R. 531; [1967] 1 Q. B. 156 (trapeze artiste a servant).

"The cases have over and over again stressed the importance of the factor of superintendence and control, but that it is not the determining test is quite clear . . . clearly superintendence and control cannot be the decisive test when one is dealing with a professional man, or a man of some particular skill and experience. Instances of that have been given in the form of a master of a ship, an engine driver, a professional architect or, as in this case, a consulting engineer. In such cases there can be no question of the employer telling him how to do the work; therefore, the absence of control and direction in that sense can be of little, if any, use as a test."

It has therefore been suggested that the test that should now be applied in distinguishing a "servant" from other agents is

"Was the contract a contract of service within the meaning which an ordinary person would give to the words?" (*m*).

But the opinion of the ordinary man (*n*) is not a very helpful guide in a matter which causes the greatest difficulty to the courts themselves; and indeed the "ordinary person" would hardly think of a house-surgeon, for example, as a "servant". The truth of the matter is that to-day the category of "servant" has probably expanded beyond specific definition; that the courts must decide each case with many *criteria* in mind, including, as well as the factor of control, the employer's *power of selection* of the person concerned, the *nature of the payment fixed* (wages or salary), and the employer's rights in respect of *suspension or dismissal* (*o*). Thus, for instance, a contract between a contractor and a subcontractor has been held not to be a contract of "service" even when it is on a "labour only" basis (*p*), and one who uses his own vehicle for transporting material for others has been held to be an independent contractor (*q*).

On the other hand, Lord DENNING has suggested a realistic criterion towards which modern decisions may well be moving:—

"One feature that seems to run through the instances is that, under a contract of service, a man is *employed as part of the business*, and *his work is done as an integral part of it.*" Whereas the contract is

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(*m*) *Cassidy's Case* (note (*k*) above), pp. 352–3; per SOMERVELL, L.J.

(*n*) The servant's own views as to his status are equally unreliable; the man who says, stoutly, "I take no orders from anybody", may, nevertheless, in law, well be a "servant"; see *Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool), Ltd.*, [1946] 2 All E. R. 345; [1947] A. C. 1.

(*o*) See *Short* v. *J. and W. Henderson, Ltd.* (1946), 62 T. L. R. 427, 429; *per* Lord THANKERTON, who adds however that, under "modern industrial conditions . . . when an appropriate occasion arises, it will be incumbent on this House to reconsider and restate these *indicia*".

(*p*) *Emerald Construction Co., Ltd.* v. *Lowthian*, [1966] 1 All E. R. 1013: *Re C. W. & A. L. Hughes, Ltd.*, [1966] 2 All E. R. 702.

(*q*) *Ready Mixed Concrete (South East), Ltd.* v. *Minister of Pensions and National Insurance*, [1968] 1 All E. R. 433.

not one of service if the "work, although done for the business, is not integrated into it, but is only accessory to it" (*r*).

This is all that can be attempted at the present time by way of defining "servant" in the legal context now under consideration; but a further matter remains to be noticed. Difficulty sometimes arises where someone who is admittedly the "servant" of one person (sometimes called the "general employer") is lent by that person to another ("special employer") for a particular purpose or for a period of time. In such a case, if the employee injures a third party, who is vicariously responsible? The general employer or the special employer?

Of course fundamentally the answer to this question is simple; no man can serve two masters, and applying the proper legal tests, it must be ascertained, as at the time of the accident, which of the two parties was in the "master" relationship to the employee (*s*). This will involve a consideration of all relevant factors, such as who had the right of control over the employee's work, "who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed" (*t*). It may for instance be very relevant that the injury complained of was caused by the servant's misuse of equipment supplied to him by his *general* employer (*u*), though he was engaged at the time upon the *special* employer's business. And it may also be relevant that the employee is a skilled man whose work the special employer cannot be expected to control (*v*).

But it must be stressed that in cases which thus involve the "lending" of servants, the incidence of vicarious responsibility is not solely determined by the application of the ordinary rules which define the master-servant relationship; for the matter is complicated by the fact that it has been laid down that it lies upon the *general employer to establish that the vicarious responsibility*, which is by nature his, *has been shifted from him to the shoulders of the special employer*. And the onus of establishing this is "a heavy one and

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(*r*) *Stevenson Jordan and Harrison, Ltd.* v. *Macdonald and Evans*, [1952] 1 T. L. R. 101, 111 (italics ours).

(*s*) See *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E. R. 491, 495; [1942] A. C. 509, 515; *per* Lord WRIGHT.

(*t*) *Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool), Ltd.*, [1946] 2 All E. R. 345, 351; [1947] A. C. 1, 17; *per* Lord PORTER. Compare the statement of Lord THANKERTON in *Short's Case* (above, note (*o*)).

(*u*) *Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool), Ltd., supra.*

(*v*) *Savory* v. *Holland, Hannen and Cubitts (Southern), Ltd.*, [1964] 3 All E. R. 18.

can only be discharged in quite exceptional circumstances" (*a*), (*b*). But such circumstances do sometimes arise where the facts point irresistibly to the conclusion that the special employer is in fact in the position of "master" at the time of the accident (*c*). Further, whatever may be the position as between the injured plaintiff and the two employers the latter may by the terms of their contract so regulate matters that *as between themselves* (whatever their joint liability to the plaintiff) that the special employer may accept sole responsibility *vis-à-vis* the general employer (*d*).

ILLUSTRATION 128

In modern law many people are treated as "servants" for the purposes of vicarious liability who are not directly subject to their employer's control.

Collins *v.* Hertfordshire County Council, [1947] 1 All E. R. 633; [1947] K. B. 598.

The defendants were a hospital authority. A house surgeon (*e*) in their employment, instead of "procaine", negligently ordered "cocaine" to be supplied as a local anaesthetic during an operation. *Cocaine* in the quantity supplied, and in the event injected, was known to be, and in fact proved to be lethal. *Held:* The house surgeon was in the position of a servant to the authority; and they were therefore liable for the death of the patient so injected.

ILLUSTRATION 129

Where a servant, who is in the general employment of one person, is engaged in the special employment of another, the burden of establishing that vicarious responsibility for the servant's tort rests upon the "special", as opposed to the "general", employer is a heavy one.

(*a*) *Ibid.*, pp. 348, 10; *per* Viscount SIMON. But, as Lord UTHWATT ndicated (pp. 354, 22), the weight of the onus may vary. For example, it would be easier to establish that the services of a labourer have been transferred than those of a skilled technician. See *Harris (Harella), Ltd.* v. *Continental Express, Ltd., and Burn Transit, Ltd.*, [1961] 1 Lloyd's Rep. 251.

(*b*) A similar onus lies upon the *servant* who seeks to sue the *special employer* for breach of a master's common law duties: *O'Reilly* v. *Imperial Chemical Industries, Ltd.*, [1955] 3 All E. R. 382. But see Lord DENNING, M.R.'s comments on this case in *Savory's Case* (above, n. (*v*)) at p. 21.

(*c*) *Gibb* v. *United Steel Cos., Ltd.*, [1957] 2 All E. R. 110 (on facts, special employer clearly in position of "master"): *Jones* v. *Scullard*, [1898] 2 Q. B. 565 (servant driving special employer's horses and carriage over long period).

(*d*) *Arthur White (Contractors), Ltd.* v. *Tarmac Civil Engineering, Ltd.*, [1967] 3 All E. R. 586.

(*e*) Only in fact a student in her final year; but, since *Cassidy* v. *Minister of Health*, [1951] 1 All E. R. 574; [1951] 2 K. B. 343, this fact cannot be considered relevant.

Mersey Docks and Harbour Board *v.* Coggins and Griffiths (Liverpool), Ltd., [1947] 2 All E. R. 345; [1947] A. C. 1.

The appellants hired out a crane to the respondents (a firm of stevedores) for the purpose of unloading a ship. The appellants also provided a driver for this crane, upon the terms that (though he was in their own general employment) he should be, for the period of the contract, "the servant of the hirers". In fact, although the respondents, through their servants, supervised the ordering of this driver's work, they had no power of control over his actual management of the crane. During the unloading the driver injured a third party by negligent working of the crane. *Held:* Since the respondents had no control over the driver's discretion in the management of the crane, the appellants remained responsible for his negligence. The terms of the contract, though suggesting that the parties had a contrary intention, could not affect the rights of the person injured (*f*).

(b) The Course of Employment

The fact that one man is in a legal sense the "servant" of another does not in itself render the "master" liable for any and every tort which the servant may commit. On general principles of agency the employer will, of course, be held responsible for a tort which he actually authorises, whether it be committed in or out of working hours. But beyond this the bounds of the master's liability are determined by the work that the servant is *employed* to do (*g*); and the master will therefore (authorisation apart) only be held responsible for such torts as are committed by the servant *in the course of his employment.*

In determining whether a particular act or omission is or is not thus within the scope of the servant's employment, it may sometimes help to apply fairly simple tests. For example, where a man commits a tort (such as causing injury by negligence) in the course of a journey which he is employed to undertake, it may be relevant to ask whether the accident occurred upon his authorised route. For if it did, it is reasonable to suppose that at the time this servant was "on his master's business" (*h*); if it did not, the same may still be true if, as servants will, he merely *deviated* from his duty by making a detour from his instructed course. But if the accident occurred far from the route, when the servant had

(*f*) See also *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board*, [1942] 1 All E. R. 491; [1942] A. C. 509; *Bontex Knitting Works* v. *St. John's Garage*, [1943] 2 All E. R. 690; *The Panther and The Ericbank, Trishna (Owners)* v. *Panther (Owners)*, [1957] 1 All E. R. 641; [1957] P. 143.

(*g*) See *Hilton* v. *Thomas Burton (Rhodes), Ltd.*, [1961] 1 All E. R. 74, 76; *per* Diplock, J.

(*h*) See *Joel* v. *Morison* (1834) 6 C. & P. 501, 503; *per* Parke, B.

departed from his work, "on a frolic of his own"(*i*)—say, to make a call upon a friend—it will be reasonable to hold that, at the time, he was not acting in the course of his employment. And a similar distinction may be made (likewise a question of degree) where considerations other than the *place* of commission of the tort fall to be determined.

But in general there can, in the nature of things, be no golden rule for determining the boundaries of a man's employment and every case must turn upon its special facts. The following examples and illustrations are therefore intended as guides, by way of contrast, and nothing more, to show how in practice the courts approach the decision of this problem.

In the following instances it was held that the tort concerned might lie *within the course of employment*:—

Where a person was injured by a motor bus; the *driver* of the bus having, in breach of duty, permitted the *conductor* to drive (*k*). Where a porter, who *had authority* to prevent passengers from taking the wrong train, injured the plaintiff by pulling him violently out of what was in fact the right one (*l*). Where a clerk, who was *permitted to use* a lavatory in his employer's office, negligently left a tap turned on and premises below were flooded (*m*). Where some servants, whose duty it was to burn rubbish upon their employer's land, collected it on neighbouring land (a trespass) and negligently left it burning, causing damage to property (*n*). Where a man who was employed to drive a lorry allowed a man who had never driven before to drive it (*o*).

In the following instances it was held that the tort concerned could *not* be held to have been committed within the course of employment:—

Where the *conductor* of a bus *took it upon himself* to turn the bus, and caused injury while so engaged (*p*). Where a station master caused the

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(*i*) See *Joel* v. *Morison* (1834), 6 C. & P. 501, 503; *per* PARKE, B. It has, however, been stressed in recent cases that where breach of statutory duty is concerned not every statute which imposed duties on the employer must be taken to exclude liability for "frolics", especially when indulged in on the employer's premises. See *Uddin* v. *Associated Portland Cement Manufacturers, Ltd.*, [1965] 2 All E. R. 213; [1965] 2 Q. B. 582: *Allen* v. *Aeroplane and Motor Aluminium Castings, Ltd.*, [1965] 3 All E. R. 377.

(*k*) *Ricketts* v. *Thomas Tilling, Ltd.*, [1915] 1 K. B. 644.

(*l*) *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148. The fact that the train was the right one was not of course material.

(*m*) *Ruddiman & Co.* v. *Smith* (1889), 60 L. T. 708.

(*n*) *Goh Choon Seng* v. *Lee Kim Soo*, [1925] A. C. 550.

(*o*) *Ilkiw* v. *Samuels*, [1963] 2 All E. R. 879.

(*p*) *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530. Compare BLACKBURN, J.'s illustration of the footman taking it upon himself to drive

plaintiff to be arrested for failing to pay for the carriage of a horse—the Railway Company having no power to authorise arrest in such circumstances (*q*). Where a solicitor's clerk caused flooding by leaving a tap running in his employer's lavatory, which he had ***no authority*** to use (*r*). Where a man who was employed as manager of a sewage farm in widening a ditch of his own initiative cut away the far bank which was the plaintiff's property (*s*).

ILLUSTRATION 130

If the servant's tortious act is within the class (t) of acts which he is employed to do, the master will be liable; but if the act constitutes a departure from the servant's duty, the master will not be liable.

(a) *Master responsible:—*

Kay *v.* I.T.W., Ltd., [1967] 3 All E. R. 22; [1968] 1 Q. B. 140.

Plaintiff was injured when the general assistant manager of defendant's warehouse backed a diesel truck belonging to another firm. The manager was employed to drive cars on the premises and backed the truck in order to make way for a van he wished to take into the warehouse. *Held:* Within the scope of employment. Defendants liable (*u*).

Century Insurance Co., Ltd. *v.* Northern Ireland Road Transport Board, [1942] A. C. 509.

The respondents were insured by the appellants against damage arising from the use by the respondents of their petrol tankers. One of the respondents' drivers, while delivering petrol at a garage, lit a cigarette, and threw the match upon the floor of the garage. This caused an explosion and certain property was damaged. The appellants claimed that they were not liable for this damage because (*inter alia*) the driver's act was outside the scope of his employment, and the respondents themselves were not therefore responsible. *Held:* The

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his master's coach: *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526, 542. Contrast *Kay* v. *I.T.W., Ltd.* (Illustration 130).

(*q*) *Poulton* v. *London and South Western Rail. Co.* (1867), L. R. 2 Q. B. 534.

(*r*) *Stevens* v. *Woodward* (1881), 6 Q. B. D. 318.

(*s*) *Lord Bolingbroke* v. *Swindon Local Board* (1874), L. R. 9 C. P. 575. In *Goh Choon's Case* (above, note (*n*)) the trespass was merely incidental; here it was something quite outside the manager's authority.

(*t*) See *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 266; *per* WILLES, J.; *Poland* v. *John Parr & Sons*, [1927] 1 K. B. 236, 243; *per* SCRUTTON, L.J.

(*u*) See also *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422; *Aitchison* v. *Page Motors, Ltd.*, [1935] All E. R. Rep. 594; *McKean* v. *Raynor Bros., Ltd.*, [1942] 2 All E. R. 650; *Harvey* v. *R. G. O'Dell, Ltd.*, [1958] 1 All E. R. 657, [1958] 2 Q. B. 78. Contrast *Higbid* v. *R. C. Hammett, Ltd.* (1932), 49 T. L. R; 104 (butcher boy riding employer's bicycle in lunch hour); *Hilton* v. *Thomas Burton (Rhodes), Ltd.*, [1961] 1 All E. R. 74.

driver's negligent act *was* within the scope of his employment; and the appellants' claim failed (*a*).

(b) *Master not liable:—*

O'Reilly *v.* National Rail and Tramway Appliances, Ltd., [1966] 1 All E. R. 499.

At defendant's foundry where their employees were busy breaking up scrap metal there was found among the scrap a live shell. A fellow worker challenged plaintiff: "Hit it", he said. "What are you scared of?" Plaintiff did hit it with a sledge hammer: it exploded. *Held:* Defendants not liable. The fellow worker's prank was an isolated act of encouragement outside the scope of his employment (*b*).

Warren *v.* Henlys, Ltd., [1948] 2 All E. R. 935.

X, who was employed by the defendants at one of their garages, thought the plaintiff was about to drive off without paying for some petrol which X had supplied. After hot words had passed between X and the plaintiff, the latter threatened to report X to the defendants: X thereupon hit the plaintiff and knocked him to the ground. *Held:* The assault was not committed in the course of X's employment; his action was dictated by personal malice, and was not within the class of acts he was employed to do (*c*).

Many factors have to be taken into account in determining whether a particular act is or is not within the scope of employment; and there is probably no single factor which, taken in isolation, can ever determine the issue alone.

Thus it might at first sight seem reasonable that if, in committing a tort, the servant *acts for his own benefit*, and not for his master's, the latter should *always* be absolved (*d*); but this is not necessarily (*e*) so. For, amongst other things, in setting up a servant as his agent to do a class of acts, the employer holds him out to others as his own representative, and if, in this capacity, the servant chooses to enrich or indulge himself at the expense of

(*a*) See also *Jefferson* v. *Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281.

(*b*) See also *Mitchell* v. *Crasweller* (1853), 13 C. B. 237; *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476; *Sanderson* v. *Collins*, [1904] 1 K. B. 628. For similar pranks see *Smith* v. *Crossley Bros., Ltd.* (1951), 95 Sol. Jo. 655 and contrast *Hudson* v. *Ridge Manufacturing Co., Ltd.*, [1957] 2 All E. R. 229; [1957] 2 Q. B. 348.

(*c*) Compare *Daniels* v. *Whetstone Entertainments, Ltd.*, [1962] 2 Lloyd's Rep. 1, and contrast *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1873), L. R. 8 C. P. 148.

(*d*) Due to misunderstanding of a *dictum* of WILLES, J., in *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Exch. 259, 265, it was, at one time, thought that this was in fact the law. But see *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C. 716.

(*e*) Though in some circumstances the fact that the servant acts for his own benefit *may* be taken into account: *Joseph Rand, Ltd.* v. *Craig*, [1919] 1 Ch. 1.

others, it is only right that the person who placed him in a position to do so should be answerable (*f*).

Similarly, the master will not necessarily (*g*) escape responsibility if it is established that at the time the tort was committed the servant was doing something the master had *forbidden* him to do; for a particular act, or acts, may still be within the *general class* of acts for which the servant is employed, even though they are themselves prohibited. Thus where the driver of an omnibus was forbidden by his employers to obstruct buses of rival companies, and in contravention of this instruction he did obstruct one of them, and overturned it, the employers were held liable (*h*); for the errant driver was, at the time of the accident, doing what he was employed to do—even though he was acting wrongfully and against orders. Indeed, if the fact that the servant's act is forbidden were conclusive in favour of the master, the whole principle of the master's vicarious responsibility could easily be evaded; for employers would simply have to forbid their servants to commit torts in the course of their work.

Similar reasoning applies to intentional (*i*) or even criminal (*k*) acts of a servant (*l*). The issue always is "Is he doing what he is employed to do?" If he is the employer will be responsible: if he

(*f*) See *Lloyd's Case* (above, note (*d*)), pp. 725–7; *per* Lord HALSBURY: indeed, where the tort concerned is deceit, since every rogue intends to act for his own benefit, the rule is inevitable (*ibid.*, p. 725; *per* Lord LOREBURN).

(*g*) Although, again, the fact of prohibition may weigh in the balance to show that the act concerned was in fact outside the scope of employment. See *Joseph Rand, Ltd.* v. *Craig*, [1919] 1 Ch. 1; *Conway* v. *George Wimpey & Co., Ltd.* (Illustration 131 (b)).

(*h*) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526: *Ilkiw* v. *Samuels*, [1963] 2 All E. R. 879.

(*i*) See *Dyer* v. *Munday*, [1895] 1 Q. B. 742, and contrast *Warren* v. *Henlys, Ltd.*, [1948] 2 All E. R. 935. It seems that at one time a master could not be held liable for his servant's *intentional trespass*, unless it was directly authorised (*Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580, 585–6; *per* PARKE, B.): but this limitation of the master's responsibility no longer applies.

(*k*) It used to be maintained that criminal acts could not give rise to civil vicarious liability: for *Cheshire* v. *Bailey*, [1905] 1 K. B. 237 and *Mintz* v. *Silverton* (1920), 36 T. L. R. 399 were thought by some so to have held. But this was contrary to the doctrine of *Lloyd* v. *Grace, Smith & Co.* (Illustration 131) and is certainly no longer law: see *Morris* v. *C. W. Martin & Sons, Ltd.*, [1965] 2 All E. R. 725; [1965] 1 Q. B. 716; *United Africa, Ltd.* v. *Saka Owoade* [1957] 3 All E. R. 216; [1955] A. C. 130.

(*l*) But of course the employer must owe a duty of care to the complainants. Thus in the case of gratuitous bailment—as where a guest leaves his coat in my hall where my servant (whom I believe to be honest) steals it—the bailee owes a duty only to keep the chattel as his own and will not be held responsible if he fulfils that duty: see *Morris' Case* (last note at pp. 731 and 725) per Lord DENNING, M.R. Also an occupier owes no duty to a visitor to prevent theft of his belongings; as where an actor leaves clothes in a dressing-room: *Deyong* v. *Shenburn*, [1946] 1 All E. R. 226; [1946] K. B. 227: *Edwards* v. *West Hertfordshire Group Hospital Management Committee*, [1957] 1 All E. R. 541.

is not the employer will not be responsible. Thus if a mink coat be entrusted to a furrier for cleaning and a servant of the furrier's, having been ordered to clean the coat, steals it, the furrier will be liable for the loss (*m*). But "If a window cleaner steals a valuable article from my flat whilst he is working there, I cannot claim against his employer unless he was negligent in employing him" (*n*). The fact that the work may afford an *opportunity* to defraud (*o*) is not the same thing as the fact that the fraud occurs in the course of the work for which the man is employed (*p*). But of course the employer must not be negligent in his selection of his servants (*q*): since he who employs a thief must beware of the consequences.

It should also be added that the fact that the servant is acting outside the *ordinary* course of his duties, and upon his own initiative, will not necessarily (*r*) place his actions outside the technical scope of his employment. Actions of this kind may sometimes be taken in the master's interest, and be such that they must be taken to have his implied authority, as necessary extensions of the ordinary course of duty (*s*). So for example, it is reasonably to be presumed that an employer intends that his servants shall at all times have implied authority to protect his property (*t*); and accordingly an employer was held responsible for the action of a carter who, while off duty, struck and injured a boy whom he believed (though as it happened mistakenly) to be stealing sugar from his employer's waggon (*u*).

ILLUSTRATION 131

(a) *A tort may be committed within the scope of employment, even though it be committed intentionally, or for the servant's own benefit.*

Lloyd *v.* Grace, Smith & Co., [1912] A. C. 716.

Their managing clerk, while acting as a representative of the respondent firm of solicitors, by fraud induced a poor widow (the appellant)

(*m*) See *Morris' Case* (above, n. (*k*)).

(*n*) *Ibid.* at pp. 732 and 727; *per* Lord DENNING, M.R.

(*o*) See *Ruben and Landenburg* v. *Great Fingall Consolidated*, [1904–1907] All E. R. Rep. 882; [1906] A. C. 439: *Leesh River Tea Co.* v. *British India Steam Navigation Co., Ltd.*, [1966] 3 All E. R. 593; [1967] 2 Q. B. 250.

(*p*) *Lloyd* v. *Grace, Smith & Co.* (Illustration 131 (*a*)).

(*q*) *De Parrell* v. *Walker* (1932), 49 T. L. R. 37.

(*r*) Again of course, it *may* do so: *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270; *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; *Houghton* v. *Pilkington*, [1912] 3 K. B. 308.

(*s*) *Seymour* v. *Greenwood* (1861), 7 H. & N. 355; *Gwilliam* v. *Twist*, [1895] 1 Q. B. 557.

(*t*) See *D'Urso* v. *Sanson*, [1939] 4 All E. R. 26; *Hyett* v. *Great Western Rail. Co.*, [1947] 2 All E. R. 264; [1948] 1 K. B. 345.

(*u*) *Poland* v. *John Parr & Sons*, [1927] 1 K. B. 236.

to transfer to him a sum of money and the title deeds of certain cottages. *Held:* The respondents were liable. "If the agent commits the fraud purporting to act in the course of business such as he was authorised, *or held out as authorised*, to transact on behalf of his principal, then the latter may be held liable for it" (*a*).

(b) *A tort may be within the scope of employment even though it is committed while the servant is doing something his master has forbidden him to do.*

London County Council *v.* Cattermoles (Garages), Ltd., [1953] 2 All E. R. 582.

X, who was employed by the respondents as a garage hand, was authorised to push vehicles from one part of the respondents' garage to another, but he was expressly forbidden to *drive* them. In order to make room for other vehicles at the petrol pumps, he did drive a van onto the highway. Due to his negligence, a collision there occurred between the van and a vehicle belonging to appellants. *Held:* Respondents were liable; X was doing something necessarily incident to his employment, and the fact that he had been forbidden to *drive* vehicles did not alter the position (*b*).

Contrast:—

Conway *v.* George Wimpey & Co., Ltd., [1951] 1 All E. R. 363; [1951] 2 K. B. 266.

Respondents, who were engaged upon building operations at Heath Row aerodrome, provided lorries to take *their own* employees from one part of the site to another. Their drivers had instructions only thus to accept *fellow employees* for rides; and in the cab of each lorry these instructions were repeated in the form of a written notice. Appellant who was employed by *another firm* (also engaged upon the site), received injuries due to the carelessness of the driver, while he was being conveyed upon one of respondents' lorries. *Held:* Respondents were not liable. "Taking men not employed by the (respondents) onto the vehicle *was not merely a wrongful mode of performing the act of the class this driver was employed to perform, but was the performance of an act of a class which he was not employed to perform at all.* In other words, the act was outside the scope of his employment" (*c*).

In every case, therefore, the ultimate issue to be determined is whether, upon *all the facts*, the act complained of is within the *class*

(*a*) [1912] A. C., at p. 725; *per* Lord LOREBURN (italics ours). See also *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 2 All E. R. 344; [1939] 2 K. B. 248.

(*b*). See also *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; *Canadian Pacific Rail. Co.* v. *Lockhart*, [1942] 2 All E. R. 464; [1942] A. C. 591; *Young* v. *Edward Box & Co., Ltd.*, [1951] 1 T. L. R. 789.

(*c*) [1951] 2 K. B., at p. 276; *per* ASQUITH, L.J. (italics ours). See also *Twine* v. *Bean's Express, Ltd.* (1946), 62 T. L. R. 458.

of acts which constitute the servant's work. Where there is a jury, this is of course a jury question; but the judge may withdraw the case from their consideration if he does not consider that the plaintiff has satisfied the onus (which lies on *him*) of establishing that there is on all the facts sufficient evidence to justify a finding in his favour (*d*).

3. LIABILITY FOR PARTNERS

Partnership liability is governed by the Partnership Act, 1890, s. 10:—

> Where, for any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm . . . the firm is liable therefor to the same extent as the partner so acting or omitting to act" (*e*).

And it is further provided by section 12 of the Act that, where the firm is held liable, the liability of individual partners is joint and several.

If the wrongful act is committed with the *authority* of the co-partners this liability is, of course, no more than an illustration of the ordinary principles of agency; but it must be noticed that liability is *also* imposed where the tort is committed by a partner "*acting in the ordinary course of business of the firm*", even though its commission has not been authorised by the other partners. In this case the agency arises by implication of law simply from the existence of the partnership itself. But, in the absence of authority express or implied, the firm will *not* be liable for wrongs committed by a partner acting *outside* the ordinary course of business. Whether a particular act is, or is not, done in the ordinary course of the firm's business is a question (like the question whether a servant is acting within the course of employment) which can only be determined in the light of the particular facts of each case.

(*d*) See *e.g. Warren* v. *Henlys, Ltd.*, [1948] 2 All E. R. 935.

(*e*) But the Statute of Frauds Amendment Act, 1828, s. 6, creates an exception. This section exempts the *firm* from liability for *fraudulent representations as to the character or solvency of any person* unless the representation is in *writing signed by all the partners*. See *Williams* v. *Mason* (1873), 28 L. T. 232; *Swift* v. *Jewesbury* (1874), L. R. 9 Q. B. 301; *Banbury* v. *Bank of Montreal*, [1918] A. C. 626. In *Meekins* v. *Henson*, [1962] 1 All E. R. 899; [1964] 1 Q. B. 472. WINN, J. seems to have taken the ground that this section has no application where the act concerned is authorized by a partner since then he is personally liable without the need to invoke the section. Though surely he could have held—the evidence being very uncertain—that where one partner publishes a defamatory statement subject to privilege he has committed a tortious act (though privileged) and that malice in another partner renders him liable under the Partnership Act, 1890, s. 10 (17 Halsbury's Statutes (2nd Edn.) 586).

ILLUSTRATION 132

Partners are liable for torts committed by their co-partners acting in the ordinary course of the firm's business.

Hamlyn *v.* Houston & Co., [1903] 1 K. B. 81.

The respondent firm was a firm of grain merchants; it consisted of two partners, H and S. H conducted all the business, and S took no active part. For the purposes of the business it was necessary to discover what contracts were being made by competitors. The appellant was a competitor. H bribed one of his clerks in order to secure from him the required information, and the clerk thus broke an implied term of his contract of service with the appellant. In an action by the appellant against the firm: *Held:* In doing what he did, H was acting in the course of the firm's business, and the fact that he acted dishonestly did not alter this position; the firm was therefore liable (*f*).

4. LIABILITY FOR INDEPENDENT CONTRACTORS

For the purposes of this branch of the law an "independent contractor" is a person, other than a partner, who works for another upon terms which do not create the "master-servant" relationship, where the contract is not one for the work but "for the results of the work" (*g*). An obvious example is the case of a builder who contracts to build a house for a client (*h*).

The general rule appears (*i*) to be *that an employer is not held responsible for the torts of an independent contractor (or the servants of such a contractor) committed in the course of the work that he is employed to do.* This rule marks the distinction between the legal position of the "independent contractor" on the one hand, and of the "servant" on the other.

(*f*) See also *Blyth* v. *Fladgate*, [1891] 1 Ch. 337.

(*g*) *Herbert* v. *Harold Shaw, Ltd.*, [1959] 2 All E. R. 189, 192; [1959] 2 Q. B. 138, 144; *per* HODSON, L.J.

(*h*) But in order to create the relationship there must be some element of contract. For example, a manufacturer is not the "independent contractor" of a person who buys his wares through a middleman: *Davie* v. *New Merton Board Mills*, [1959] 1 All E. R. 346; [1959] A. C. 604. But where a manufacturing firm sends its wares to another firm for processing before distribution that firm is *vis-à-vis* the manufacturer an independent contractor and the latter will not *prima facie* be responsible for its negligence: *Taylor* v. *Rover Co., Ltd.*, [1966] 2 All E. R. 181.

(*i*) There are, however, some *dicta* which, read at their face value, are so broad that they almost seem to destroy the validity of the Rule itself. *E.g.* Lord BLACKBURN'S celebrated *dictum* in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 829: "a person causing something to be done, the performance of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". To similar effect, *Cassidy* v. *Ministry of Health*, [1951] 1 All E. R. 574, 584; [1951] 2 K. B. 343, 363; *per* DENNING, L.J.

But the exceptions to the rule are both numerous and important; and the employer *may* be held responsible for the torts of an independent contractor or his servants, committed in the course of the work undertaken, in the following circumstances (*k*):—

(i) Where the tort concerned is any one of the following torts in which liability is "strict", in the sense that it is imposed irrespective of negligence on the part of the tortfeasor: nuisance by disturbance of support to land or buildings (*l*), liability arising under the Rule in *Rylands* v. *Fletcher* (*m*), breach of a non-delegable statutory duty (*n*). (ii) Where the work undertaken involves the creation of at least some kinds (*o*) of dangers on or near the highway (*p*), or possibly also in other places ordinarily accessible to the public (*q*). The tort concerned in these cases will usually be either nuisance or negligence. Thus, for example, in *Holliday* v. *National Telephone Co.* (*r*), the defendants were held liable for injuries caused to the plaintiff by an explosion which resulted from the negligence of their contractor's servant in the use of a defective blow lamp; the work which, under the contract, the servant was engaged in doing was on the public highway, and the use of a blow lamp was a necessary part of it. (iii) Where the work undertaken involves the use of fire, and the fire gives rise to the injury (*s*). Where the tort concerned is a breach of a duty "personal" to the employer whether it be owed to his employees or to others (*t*). Thus shipowners are personally responsible for such matters as the seaworthiness and speed regulation of their vessels; and they cannot cast the responsibility for these things upon others (*u*). (v) Where a person is in breach of his common law duty as a hirer or carrier for reward to make the means of transport as safe as

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(*k*) It is not pretended that this list of exceptions is exhaustive. It would, indeed, be difficult to compile an exhaustive list, since the current tendency seems to be to extend them. See, *e.g.*, *Darling* v. *A.-G.*, [1950] 2 All E. R. 793.

(*l*) *Bower* v. *Peate* (1876), 1 Q. B. D. 321; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Hughes* v. *Percival* (1883), 8 App. Cas. 443.

(*m*) (1868), L. R. 3 H. L. 330.

(*n*) *Gray* v. *Pullen* (1864), 5 B. & S. 970.

(*o*) It may be that this exception is no more than a particular application of exception (vi)—though it does apply in the case of personal injuries—for it seems only to embrace serious dangers. See *Quarman* v. *Burnett* (1840), 6 M. & W. 499; *Phillips* v. *Britannia Laundry Co.*, [1923] 2 K. B. 832.

(*p*) *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335; *Penny* v. *Wimbledon Urban Council*, [1899] 2 Q. B. 72; *Pinn* v. *Rew* (1916), 32 T. L. R. 451. The same principle also applies where dangers are created in navigable rivers: *The Snark*, [1900] P. 105.

(*q*) *Pickard* v. *Smith* (1861), 10 C. B. N. S. 470 (cellar flap on railway platform).

(*r*) [1899] 2 Q. B. 392.

(*s*) *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Balfour* v. *Barty-King*, [1957] 1 All E. R. 156; [1957] 1 Q. B. 496.

(*t*) *Wilsons and Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E. R. 628, 641; [1938] A. C. 57, 83–4; *per* Lord WRIGHT.

(*u*) *The Lady Gwendolen*, [1965] 2 All E. R. 283; [1965] P. 294.

reasonable care and skill can make it (*v*). (vi) Where a bailee for reward entrusts the property bailed to an independent contractor (*a*). (vii) Where "a man does work on or near another's property *which involves danger to that property unless proper care is taken* he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and *is equally liable if*, instead of doing the work himself, *he procures another* . . . to do it for him (*b*). This broad category probably embraces some of the exceptions already noted, though it is somewhat wider in scope, since it includes all activities which have been stigmatised as "extra hazardous" (*c*) activities which "in their very nature" (*d*) involve a special danger that a tort will be committed in the course of them (*e*).

Subject to these exceptions, the rule that an employer is not held responsible for the torts of an independent contractor applies. And it is to be noted that it is no exception to it that the employer *will* be held responsible for his *own* negligence if the tort concerned arises from the fact that he has employed an incompetent contractor or from the fact that he has given the contractor inadequate directions (*f*), nor is it an exception that the employer will be held responsible, under the general rules of agency, if the act authorised is itself unlawful (*g*).

Even however where the circumstances are such that the employer may be held responsible for the contractor's torts, he will only be liable if the tort in question arises directly from the nature of the work itself rather than merely from the mode of performance of it (*h*). But he will not be liable for what is sometimes called

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(*v*) See above, p. 231. But the occupier of premises or structures is not now liable to other lawful visitors, whether by way of contract or otherwise, for the negligence of an independent contractor unless he or his servants have been negligent. See Occupiers' Liability Act, 1957, ss. 2 (4) (b), 3 (2), 5 (1) (37 Halsbury's Statutes (2nd Edn.) 832). There was some doubt about the position at common law: see *Riverstone Meat Co., Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.*, [1961] 1 All E. R. 495; [1961] A. C. 807.

(*a*) *British Road Services, Ltd.* v. *Arthur V. Crutchley, Ltd.*, [1968] 1 All E. R. 811.

(*b*) *Brooke* v. *Bool*, [1928] 2 K. B. 578, 587; *per* TALBOT, J.

(*c*) *Honeywill and Stein, Ltd.* v. *Larkin Brothers, Ltd.*, [1933] All E. R. Rep. 77; [1934] 1 K. B. 191, 197; *per* SLESSER, L.J.

(*d*) *Matania* v. *National Provincial Bank, Ltd., and Elevenist Syndicate, Ltd.*, [1936] 2 All E. R. 633, 646; *per* SLESSER, L.J. (a case of nuisance).

(*e*) It is possible that, in cases where the duty placed upon the employer is not "strict", but only a duty to take reasonable care, he may escape liability if the injury arises from the contractor's failure to exercise *specialised* skill which the employer could not be expected to have: *Szumczyk* v. *Associated Tunnelling Co., Ltd.*, [1956] 1 All E. R. 126.

(*f*) *Robinson* v. *Beaconsfield Rural Council* (Illustration 133 (c)).

(*g*) *Ellis* v. *Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767; *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488.

(*h*) *Padbury* v. *Holliday and Greenwood* (1912), 28 T. L. R. 494, 495; *per* FLETCHER MOULTON, L.J.

"*collateral*" negligence of the contractor or his servants; that is, for negligence which is not necessarily incidental to the work. Thus for instance the employer may be liable if he employs a contractor to repair a lamp which overhangs the highway, and the contractor leaves the lamp in a defective condition (*i*), for it is an essential part of the work undertaken that the lamp shall be made safe. But, by way of contrast, in *Reedie* v. *London and North Western Rail. Co.* (*k*) the defendant company were held not to be responsible for the negligence of the servant of a contractor who, while constructing a bridge over a highway, carelessly dislodged a stone from the building materials so that it fell on to the highway and killed the plaintiff's husband; for the servant's carelessness was merely incidental to the work.

ILLUSTRATION 133

(a) *Subject to the exceptions noted in the text, an employer will not be held responsible for the torts of an independent contractor or his servants.*

Morgan *v.* Incorporated Central Council of the Girls' Friendly Society, [1936], 1 All E. R. 404.

The plaintiff was on his way to visit the tenants of an office which was in a building owned by the defendants. While the plaintiff was in a part of the building which the defendants retained within their own control, he fell down an open lift shaft and was injured. The defendants had contracted with a firm of specialists to keep the lift safe and in order. *Held:* Negligence being imputable solely to the contractors, the defendants were not liable (*l*).

(b) *Among other exceptions to the general rule, an employer will be held responsible for damage caused by an independent contractor or his servants if the work which he is employed to do is "extra hazardous".*

Honeywill and Stein *v.* Larkin Brothers, [1934] 1 K. B. 191.

The appellants employed the respondents (a firm of specialists) to take flashlight photographs in a cinema owned by third parties. It was the usual practice, at that time, in taking such photographs, to ignite magnesium powder in front of the camera: this powder would flare up, and generate intense heat. The respondents' servant performed this process in the confined space between the footlights and the curtain. The latter caught fire, and damage resulted. The appellants, having

(*i*) *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314.
(*k*) (1849), 4 Exch. 244; see also *Wilson* v. *Hodgson's Kingston Brewery Co., Ltd.* (1916), 85 L. J. K. B. 270 and Illustration 133 (d).
(*l*) The plaintiff was on that part of the premises merely by the defendants' *licence*. Had he been there by contract with the defendants, or upon their invitation, the situation would have been different.

satisfied the cinema owners in respect of the damage, sought indemnity against the respondents. *Held:* The appellants' claim succeeded. They were, themselves, legally responsible to the third parties because, the work authorised being "extra hazardous" in its very nature, they were liable for the negligence of the servant of their independent contractors (the respondents).

(c) *It is no exception to the general rule that an employer will be held responsible if the tort in question arises from his own lack of care.*

Robinson *v.* Beaconsfield Rural Council, [1911] 2 Ch. 188.

The respondent Council, who had a statutory duty to cleanse cesspools, contracted with a man called Hook that he should cleanse certain pools in their district; but they failed to give him any directions as to the disposal of the filth. He deposited it on the appellant's land, where it caused a serious nuisance. *Held:* The respondents were liable, having failed to give proper directions, they were not discharged from their duty by casting it upon Hook.

(d) *An employer is not responsible for the "collateral" negligence of a contractor or his servants.*

Padbury *v.* Holliday and Greenwood, Ltd. (1912), 28 T. L. R. 494.

The defendants, who were building premises adjacent to a highway, employed sub-contractors to put metallic casements into the windows. An employee of these sub-contractors put down an iron tool on one of the window sills. The window having been blown to by the wind, the tool was dislodged, and it fell upon and injured the plaintiff who was passing in the street below. *Held:* The defendants were not liable, for the injury was caused by an act of collateral negligence on the part of the workman.

CHAPTER 2

DAMAGES IN TORT ACTIONS

The pecuniary compensation given to a person for the injury caused to him by a tort is known as "damages"; and the first thing to notice is that damages are of various kinds.

1. THE KINDS OF DAMAGES

General and Special.—"General" damages are pecuniary compensation which the judge or jury are entitled to award upon proof only that the tort in question has been committed; "special damages" are damages for loss or injury flowing from the tort which the law requires the plaintiff to specify in his pleadings and establish specifically. The distinction between these two kinds of damages is therefore a matter of practice and procedure, rather than of substantive law; and it is somewhat arbitrary. Thus for example in claims which involve personal injuries damages for pain and suffering are "general", they need not be quantified in the plaintiff's statement of claim, and it is for the court or jury to assess them. On the other hand damages in respect of earnings (*a*) during a period of incapacity occasioned by the injury, or damages in respect of medical expenses incurred as a result of it, are "special" and must be quantified and specifically claimed (*b*).

Special *damages* must not be confused with special *damage*; the latter means *actual* damage which is the prerequisite to the establishment of a cause of action in torts (such as negligence) which (unlike torts such as libel or trespass) are only actionable upon proof of actual damage, and are not actionable *per se* without such proof.

Nominal Damages.—Sometimes where a tort which is actionable *per se* has been committed and the plaintiff's legal right has been technically infringed (as where a man merely walks across the land

(*a*) *Shearman* v. *Folland*, [1950] 1 All E. R. 976; [1950] 2 K. B. 43.
(*b*) But the term "special" damages is by no means a term of art and is used in several different senses. See Street, *Principles of the Law of Damages*.

of another, thus committing a trespass), the plaintiff suffers no *actual* damage. In such a case it is possible for the judge or jury—since the plaintiff has suffered nothing by the tort—to award *nominal* damages, say a pound or even a shilling (*c*), to mark the infringement of the plaintiff's legal right while recognizing that he has lost nothing by it (*d*).

But from this it must not be assumed that in the case of torts actionable *per se* the plaintiff must invariably prove special damage in order to be awarded substantial damages. For it is not lightly presumed that no real injury has followed from the infringement of a legal right; the *presumption* is rather to the contrary (*e*).

Nominal damages are to be contrasted with ordinary, or "*substantial*", damages; that is to say, compensation for the real loss which, in most actions, the plaintiff has usually suffered. The rules which govern the assessment of such damages will be considered in the next section.

Contemptuous Damages.—These must not be confused with nominal damages; they may be awarded in the case of any tort, whether actionable *per se* or only upon proof of special damage, where, although the plaintiff's claim has succeeded, the judge or jury consider that the plaintiff should be deprived of substantial damages because his claim is unmeritorious. Suppose for instance that A sues B for assault; that the assault is proved, but it also appears that B was goaded into committing it on account of a highly offensive remark of A's. In such a case it might be considered right to award A a merely trifling sum by way of contemptuous damages (*f*). It should also be remarked that where this is done it is likely that the plaintiff will also be deprived of his costs.

Aggravated Damages.—Damages in tort are often said to be "at large" in the sense that no precise figure can be said to represent the amount proper for compensation. For example in a simple claim for conversion (*g*) it is clear that the value of the converted article represents the *quantum* of the plaintiff's loss, but in tort (*h*) intangible factors come into play: thus insult offered in the commission of a

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(*c*) Or even as little as a farthing: *Mostyn* v. *Coles* (1862), 7 H. & N. 872. Inflation seems however to have put the value up: five guineas in *Constantine's Case* (next note).

(*d*) *Constantine* v. *Imperial Hotels, Ltd.*, [1944] 2 All E. R. 171; [1944] K. B. 693.

(*e*) *Ashby* v. *White* (1703), 2 Ld. Raym. 938 (£200 for loss of right to vote).

(*f*) See *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686 (a case of libel; the plaintiff having made an offensive retaliation).

(*g*) See below, p. 417.

(*h*) As opposed to contract: *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C. 488.

trespass (*i*), an act done wilfully (*j*), wantonly (*k*), maliciously, or with undue consideration (*l*) may call for greater compensation than a similar act would if done in the absence of these elements; for just as pain and suffering can be taken into account in assessing damages for personal injuries so can the plaintiff's injured feelings—and this injury, at least by current notions, calls for compensation (*m*).

Exemplary Damages.—Aggravated damages are compensative in aim, though it should again be stressed that

> "Compensatory damages in a case in which they are at large may include several different kinds of compensation to the injured party. They may include not only actual pecuniary loss, or any social disadvantages which result . . . from the wrong. . . . They may also include natural injury to (the plaintiff's) feelings: the natural grief and distress which he may feel in being spoken of in defamatory terms (*n*); and if there has been any high-handed, oppressive or insulting or contumelious behaviour by the defendant which increases the mental pain and suffering which is caused . . . and which may constitute injury to the plaintiff's pride (*o*) or self-confidence, those are proper elements to be taken into account where damages are at large. There is, however, a sharp distinction between damages of that kind and truly *punitive* or *exemplary* damages" (*p*).

Damages of the latter kind (sometimes also termed "vindictive") are different for though

> "It is recognized to-day . . . that the basic rule of common law is that damages are awarded in *civil* actions *as compensation* for injury, *not* as a *punishment* for wrong-doing. To punish the wrong-doer is the function of the criminal courts. . . ." (*q*)

yet in certain exceptional circumstances defined by Lord DEVLIN in *Rookes* v. *Barnard* (*r*) where such exemplary damages are allowed the assessment is based not upon a calculation of just compensation

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(*i*) *Merest* v. *Harvey* (1814), 5 Taunt. 442.

(*j*) *Emblen* v. *Myers* (1860), 6 H. & N. 54.

(*k*) *Tullidge* v. *Wade* (1769), 3 Wils. 18.

(*l*) *Chamberlain* v. *Greenfield* (1772), 3 Wils. K. B. 292.

(*m*) If the defendant has been provoked by the plaintiff this may be a reason for refusing aggravated damages, though it cannot reduce the essentially comparative (*i.e.* for the injury, pain, etc.) element: *Lane* v. *Holloway*, [1967] 3 All E. R. 129; [1968] 1 Q. B. 379.

(*n*) *McCarey's Case* (see n. (*p*)) was a libel case.

(*o*) Should a money sop be rendered to heal the plaintiff's pride? See below, p. 402, n. (*k*). If pride is not a sin why did Lucifer fall? At times the common law looks as though Mammon had a hand in its making.

(*p*) *McCarey* v. *Associated Newspapers, Ltd.*, [1964] 3 All E. R. 947, 957; [1965] 2 Q. B. 86, 104–105; *per* PEARSON, L.J.

(*q*) See at pp. 958, 106 respectively; *per* DIPLOCK, L.J.

(*r*) [1946] 1 All E. R. 367; [1964] A. C. 1129. This part of Lord DEVLIN's speech was adopted by the House as a whole.

for loss but to visit the defendant with the court's displeasure on account of conduct, such as wanton disregard for the plaintiff's rights, which the court wishes to inhibit for the future on the part of the defendant or others. Since (*s*) *Rookes* v. *Barnard* the exceptional circumstances are first where the plaintiff has been damnified by "oppressive, arbitrary or unconstitutional action by the servants of the government" (*t*); it should "not extend . . . to oppressive action by private corporations or individuals" (*u*). Secondly, cases "in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff" (*a*). An example of behaviour of this kind is to be found in *Bell* v. *Midland Rail. Co.* (*b*) where the defendant company obstructed access to the plaintiff's wharf and did so deliberately for the purpose of extinguishing his trade and advancing their own profit. And the principle is that such damages "can properly be awarded where it is necessary to teach a wrongdoer that tort does not pay" (*c*). On the other hand the fact that publication of a newspaper is in itself a profitable thing is not enough to attract liability to exemplary damages (*d*) in respect of every libel (*e*) published, though the wilful publication of a particular article calculated to attract abnormal sales might do so (*f*). Thirdly, such damages will of course be proper where a statute authorizes them (*g*).

(*s*) Formerly it had seemed that there was a wide discretion to award exemplary damages; particularly in libel actions.

(*t*) *Rookes' Case* (above, n. (*r*) at pp. 410 and 1226–1227 respectively). And see *Wilkes* v. *Wood* (1763), Lofft. 1: *Huckle* v. *Money* (1763), 2 Wils. 205.

(*u*) *Ibid.* The reason Lord DEVLIN gives for the distinction is that the oppressive use of power by individuals (though it may well be a matter for aggravated damages) is something in a very different category from the abuse of power by public officials whose "power . . . must always be subordinate to their duty of service".

(*a*) *Ibid.*, at pp. 410 and 1226.

(*b*) (1861), 10 C. B. N. S. 287.

(*c*) *Ibid.*, at pp. 411 and 1227.

(*d*) See *Broadway Approvals, Ltd.* v. *Odhams Press*, [1965] 2 All E. R. 523; 537, 538.

(*e*) Unless the facts can be brought within one of the exceptions recognized in *Rookes' Case* it seems to be established that there can now be no award of exemplary damages in defamation: *McCarey* v. *Associated Newspapers, Ltd.*, [1964] 3 All E. R. 947; [1965] 2 Q. B. 86; *Broadway Approvals Case* (last note); *Manson* v. *Associated Newspapers, Ltd.*, [1965] 2 All E. R. 954; *Fielding* v. *Variety, Incorporated*, [1967] 2 All E. R. 497; [1967] 2 Q. B. 841. "Seems to be established" only since in *Australian Consolidated Press, Ltd.* v. *Uren*, [1967] 3 All E. R. 523, where it was decided that exemplary damages are still recoverable for defamation in Australia, it would be open to the House of Lords to reconsider the matter.

(*f*) See *Broadway Approvals* at pp. 537, 538.

(*g*) *Rookes' Case* at pp. 411 and 1227. Lord DEVLIN also adds certain cautions about awards of exemplary damages:—(1) They should only be recover-

It is as well that it has been made plain that awards of exemplary damages are to be exceptional since, as has already been remarked (*h*), nothing but confusion can result from introducing the punitive element proper to the criminal law into the law of torts (*i*): and, after all, even if there is justification for the awarding of *aggravated* damages upon a compensative principle (*k*) it is difficult to see why a benefit should come to the plaintiff on the punitive principle by way of windfall arising not from anything that he has suffered at the hands of the defendant but as a mark of public disapproval of the latter's behaviour. This is a function more appropriate to the fines which are the province of the criminal law (*l*).

It must be noted that *exemplary* damages may not be awarded where an action is brought for the benefit of the estate of a deceased person (*m*); and it also seems that they cannot be awarded in an action brought in the Chancery Division (*n*).

Prospective Damages.—As a general rule the injury resulting from one and the same cause of action must be remedied once and for all. The damages awarded must therefore include compensation for any *future* (or "prospective") damage which is likely to result from the defendant's tort, as well as compensation for accrued damage proved at the trial *No further action can be brought for any fresh damage subsequently resulting from that tort, for no more than one*

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able where the plaintiff is himself the *victim* of the defendant's misbehaviour. (2) Some past awards of exemplary damages by juries have exceeded what a court would have imposed by way of fine. Restraint must be used in the matter of *quantum* of such awards: and it may even be necessary for the House of Lords in the future to impose an arbitrary limit, as was done in *Benham* v. *Gambling*, [1941] 1 All E. R. 7; [1941] A. C. 157. (3) The means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. (One sometimes wonders whether it might not also be relevant to take this matter into account—as juries surely do in libel actions against newspapers—in the assessment of all damages.)

(*h*) Above, p. 13.

(*i*) See *Browning* v. *War Office*, [1962] 3 All E. R. at p. 1094; [1963] 1 Q. B. at p. 764; *per* DIPLOCK, L.J.

(*k*) How much justification there really is depends upon whether one accepts without reserve the notion that a money payment is a panacea for everything. That English law so regards it is plain—see e.g. *H. West & Son, Ltd.* v. *Shephard*, [1963] 2 All E. R. 625; [1964] A. C. 326—but there might be something to be said for the notion that awards of damages should be limited to proved *economic* loss for which in reality they are solely fit. Some things, like the loss of a near relative, are beyond human remedy—so, one might think is pain and suffering, for which the common law allows a *wergild*.

(*l*) Possibly the punitive element in tort was better met in the old law of trespass whereby a fine could be imposed as well as damages, at the discretion of the court?

(*m*) Law Reform (Miscellaneous Provisions) Act, 1934, s.1. (2) (a) (9 Halsbury's Statutes (2nd Edn.) 792).

(*n*) *Huntley* v. *Thornton*, [1957] 1 All E. R. 234, 256: *per* HARMAN, J.

action will lie on the same cause of action. This rule may sometimes operate harshly (*o*). For instance it follows from it that if minerals are wrongfully abstracted from a mine, damages for the trespass must take into account the possibility of later damage by subsidence of the surface caused by the abstraction (*p*); if this is not done, and subsidence later occurs, the effect of the rule is that there can be no action in respect of it, for it is not a continuing trespass to leave the surface without support. But the rule is nevertheless based upon a sound principle of expedience; for litigation about the same matter cannot be allowed to continue indefinitely—"*interest reipublicae ut sit finis litium*".

The problem of assessing such "prospective" damages is difficult and necessarily speculative, but it is one that the courts have constantly to face. To take only one example of many that might be given, in *Heaps* v. *Perrite, Ltd.* (*q*) the Court of Appeal, although they considered (at that time) that it was a large one, refused to interfere with an award of £10,000 made by SWIFT, J., in the case of a working boy who had lost both hands in an accident: it was pointed out that his whole future including his loss of earning capacity had to be taken into account.

The general rule which has been stated requires, however, to be qualified in three respects. First, it does not apply in the case of *continuing* torts and its application in the case of successive, or intermittent, torts is doubtful. These will receive separate mention. Secondly, the general rule does not apply where the same wrongful act violates two different rights. For the violation of *different rights* gives rise to *separate causes of action*, and separate claims may be brought in respect of each cause. Thus if a man is injured by the negligence of another both in regard of his person and in regard of his property, the fact that he has been awarded damages in one action in respect of the property will not be a bar to a later claim in respect of his personal injuries (*r*); though in practice the two claims will normally be made in one action. Similarly, a claim by a plaintiff *personally* is different from a claim made by the same plaintiff as an administrator of a deceased's estate, though based on the same facts (*s*). Thirdly, in exceptional circumstances fresh

(*o*) See the strictures of BRETT, M.R.: *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141; and of Lord BLACKBURN, *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, 138.

(*p*) *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *Spoor* v. *Green* (1874), L. R. 9 Exch. 99.

(*q*) [1937] 2 All E. R. 60.

(*r*) *The Oropesa*, [1942] P. 140; and see Illustration 135 (b).

(*s*) *Marginson* v. *Blackburn Borough Council*, [1939] 1 All E. R. 273; [1939] 2 K. B. 426.

evidence may be admitted on appeal which may have the effect of increasing (*t*) or diminishing (*u*) the amount of damages originally awarded (*a*).

ILLUSTRATION 134

Exemplary damages may be awarded where the plaintiff has been damnified by "oppressive, arbitrary or unconstitutional action by the servants of the government" (*b*).

Wilkes *v.* Wood (1763), Lofft., 1.

The house of the celebrated John Wilkes had been searched during the "North Briton" proceedings under a general warrant. He brought an action of trespass in respect of the illegal search—"large and exemplary damages" were demanded. *Held:* The jury were entitled to award £1,000.

ILLUSTRATION 135

(a) *No more than one action will lie in respect of the same cause of action; therefore an award of damages must take into account all injury arising from that cause, "prospective" as well as accrued.*

Fitter *v.* Veal (1701), 12 Mod. Rep. 542.

Defendant having assaulted plaintiff, the latter brought an action and recovered damages for the assault. Some time afterwards plaintiff had to have a bone removed from his skull because of the injuries he had received; he then sought to bring another action in respect of this later injury. *Held:* The second action could not be maintained. *Per curiam:* "If the plaintiff's surgeon had come to the last trial, and shewed that the plaintiff was not cured, the jury would have considered that matter . . . then was his time . . . to give evidence of it . . . it shall be intended here that the jury gave entire satisfaction of the battery."

(b) *But where the same facts give rise to more than one cause of action; a separate action will lie in respect of each cause.*

Brunsden *v.* Humphrey (1884), 14 Q. B. D. 141.

Plaintiff was a cab driver. In an accident which was caused by the negligence of defendant's servant, plaintiff was severely injured, and his cab was damaged. Plaintiff recovered damages in the county court for the damage to his cab, and later brought a separate action in the High Court in respect of his personal injuries. On appeal to the

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(*t*) *Jenkins* v. *Richard Thomas & Baldwins, Ltd.*, [1966] 2 All E. R. 15—plaintiff unable to find expected employment.

(*u*) *Curwen* v. *James*, [1963] 2 All E. R. 619—widows remarries after trial.

(*a*) Further, by R. S. C., Ord. 36, r. 34, the trial may be postponed or adjourned on the issue of damages where the interests of justice so require.

(*b*) *Rookes* v. *Barnard*, [1964] 1 All E. R. 367, 410; [1964] A. C. 1129, 1226; *per* Lord DEVLIN.

Court of Appeal, *Held:* The later action was maintainable since the two causes of action were distinct, different evidence being required to support each claim.

2. THE ASSESSMENT OF DAMAGES

This is a matter for specialized works and is one which is at present engaging the attention of the courts very frequently; such works (*c*) must therefore be consulted.

The purpose of awarding damages is to effecta "*restitutios in integrum*" (*d*) by means of compensation (*e*) commensurable to the injury sustained; but, as will appear, in personal injury cases especially, the question of what ought to be awarded must necessarily be a broad one of fact (*f*); for "Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back into his original position" (*g*).

The principles involved in the assessment of damages may be considered under two heads: first in respect of cases concerning injuries to the person, secondly in respect of injuries to property.

(a) DAMAGES FOR INJURIES TO THE PERSON

There is no fixed rule by which damages in cases of injury to the person, reputation or feelings can be estimated (*h*); for "when one is translating injuries into pounds, shillings and pence one is seeking to equate the incommensurable. . . . There is no absolutely right answer" (*i*). What is essential is that there should be uniformity (*k*) of assessment so that similar injuries receive similar awards and that the likely compensation for particular losses should be sufficiently predictable to encourage settlements. Moreover, since there is no assessing the "value" of *e.g.* the loss of an eye, the sums of money

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(*c*) *E.g.* Mayne and McGregor, *Law of Damages*; Street, *General Principles of the Law of Damages.*

(*d*) See *Liesbosch Dredger* v. *S. S. Edison*, [1933] A. C. 449, 459; *per* Lord WRIGHT.

(*e*) See *British Transport Commission* v. *Gourley*, [1955] 3 All E. R. 796, 806; [1956] A. C. 185, 212.

(*f*) *Admiralty Commissioners* v. *Surquehanna*, [1926] A. C. 655, 661; *per* Lord SUMNER.

(*g*) *Phillips* v. *London & South Western Ry. Co.* (1879), 5 Q. B. D. 78, 79; *per* FIELD, J.

(*h*) But useful guides as to what is likely to be awarded in particular circumstances and in respect of particular injuries are to be found in Kemp and Kemp, *The Quantum of Damages and Current Law.*

(*i*) *Hennell* v. *Ranaboldo*. [1963] 3 All E. R. 684, 685–686; *per* DIPLOCK, J.

(*k*) See *Singh* v. *Toong Fong Omnibus Co., Ltd.*, [1964] 3 All E. R. 925.

arrived at must inevitably be merely conventional (*l*), (*m*). All these considerations imply that the person or body making the award must know what the "usual" figure is for what—for a hand, a leg, deprivation of sense, sight or hearing, even including (as will be seen) loss of expectation of life, etc.—and of recent years there has, since juries being unaware of current "rates" may err prodigiously, been increasing tendency towards trial of personal injury cases by judge alone (*n*).

The law of damages is pre-eminently a field of law in which circumstances alter cases; for, as has already been explained, an assault in public may warrant aggravated damages, heavier than would be warranted by a similar assault committed privately, and

> "in actions of this nature (seduction), and of assaults, the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room" (*o*).

This means that many "heads" (*p*) of damage have to be taken into account. Obviously provable "special" (*q*) damage, as by way of proved and quantified loss of earnings arising from the wrong, can be recovered. But "general" damages also, as has been seen, play a part, and they include such matters as assessed loss of future earnings and less palpable things like pain and suffering endured, mental

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(*l*) See *H. West & Son, Ltd.* v. *Shephard*, [1963] 2 All E. R. 625, 631; [1964] A. C. 326; *per* Lord MORRIS.

(*m*) The above passage is adapted from the judgment of the full Court of Appeal in *Ward* v. *James*, [1965] 1 All E. R. 563; [1966] 1 Q. B. 273.

(*n*) *Ward's Case* (last note) as explained in *Hodges* v. *Harland & Wolff, Ltd.*, [1965] 1 All E. R. 1086. The history of the flight from jury trial is traced in *Ward's Case* which is authority for the following: (i) The discretion to permit or refuse jury trial (Administration of Justice (Miscellaneous Provisions) Act 1933, s. 6 and R. S. C. Ord. 34, r. 1 (3)) should, save in exceptional circumstances, be exercised in favour of trial by judge alone; (ii) Appeal lies against the decision as to the amount of damages where a *judge* has made "a wholly erroneous estimate" or where a *jury's* award is "out of all proportion to the circumstances of the case" (see *Mechanical and General Inventions Co., Ltd.* v. *Austin and Austin Motor Co., Ltd.*, [1935] A. C. 346, 377). (iii) If an appeal succeeds the Court of Appeal may vary a judge's award but it may only vary a jury's award where the parties agree (R. S. C. Ord. 59, r. 11). In the absence of such agreement the assessment must either be remitted to a judge (R. S. C. Ord. 59, r. 10 (3) and(6) or a new trial must be ordered. In *Brown* v. *Thompson*, [1968] 2 All E. R. 708 the C. A. again stressed that appellate courts should not interfere with the trial judge's assessment except in exceptional cases.

(*o*) *Tullidge* v. *Wade* (1769), 3 Wils. 18, 19; *per* BATHURST, J.

(*p*) The court should, however, award a single sum by way of general damages, and this will not necessarily be simply the aggregate amount under all heads: *Watson* v. *Powles*, [1967] 3 All E. R. 721; [1968] 1 Q. B. 376; *Fletcher* v. *Autocar & Transporters, Ltd.*, [1968] 1 All E. R. 726.

(*q*) This is hardly a term of art: it has various meanings. See Street, *Principles of the Law of Damages*.

anxiety, bodily loss—such as loss of a limb—and loss of enjoyment of the pleasures and amenities of life. The problem of assessing the latter kinds of loss in money terms (*r*) is plainly an intractable one and, as already explained, it can only really be met by forming conventional assessments appropriate to cases of similar kinds. But it has been held in *H. West & Son, Ltd.* v. *Shephard* (*s*) that there is a double aspect to such losses. To some extent they may be measured objectively; loss of a limb, for instance, or deprivation of the pleasures of life, or of bodily capacity (*t*) may—at least according to current legal notions—be valued quite apart from any question of consciousness in the afflicted person: if he has lost them they are things which he *has* lost and an hypothetical value may be put upon them. But there is also a subjective element to be considered which depends upon the actual awareness of the sufferer. Here pain is the thing to take by way of example: a man either does suffer pain or he does not. If he is rendered unconscious from the time of the injury and never regains consciousness he has had no pain and so nothing can be awarded under this head (*u*); and the same applies to mental anxiety. This distinction is important because it is logically questionable whether a person who is rendered wholly unconscious by the wrong should be entitled to damages on a comparable footing to the damages which would have been awarded to him if he were conscious. Clearly if he suffers not at all he will get less (for one thing pain is eliminated as a head of damage). But should the absence of the subjective element in, for instance, loss of amenity—absence of his *awareness* of the loss—curtail the award to a considerable extent? In *West's Case* the House of Lords, by a majority (*a*); ruled that it should not; for "The fact of unconsciousness does not . . . eliminate the *actuality* of the deprivations of the ordinary experiences and amenities of life . . .(*b*)"

(*r*) Perhaps the truth is that the award of damages in respect of such losses should not be attempted at all; for a perusal of Kemp and Kemp, *The Quantum of Damages*, may convince the reader that we have advanced not one whit since the days of *bót* and *wer*.

(*s*) [1963] 2 All E. R. 625; [1964] A. C. 326.

(*t*) See *Andrews* v. *Freeborough*, [1966] 2 All E. R. 721; [1967] 1 Q. B. 1.

(*u*) In *West's Case* no claim was made under this head; though the plaintiff being partially conscious the subjective element in relation to anxiety etc. was allowed for.

(*a*) Lord Tucker, Lord Morris, Lord Pearce: Lords Reid and Devlin. dissenting. Wisely, perhaps, the High Court of Australia have preferred to follow *West's Case* on this point: *Skelton* v. *Collins* (1966), 39 A. L. J. R. 480.

(*b*) [1963] 2 All E. R. at p. 633; [1964] A. C. at p. 349; *per* Lord Morris. (Italics ours.) It was also ruled that no account must be taken of the use to which the money awarded will be put: it is all the same whether the plaintiff be rich or poor, generous or mean (see pp. 633, 349–350).

Again, in modern times the courts have allowed a claim in respect of loss of expectation of life (*c*) as a head of damages. This is of course a commodity which is hard to assess in money and great difficulty has been experienced in determining how it should be done. Like loss of amenity it has an objective aspect—a man injured in an accident may lose, say, seven years of his normal expectation. But it also has a subjective element—to contemplate seven years less of life is a distressing thing. So difficult was this item of assessment that in *Benham* v. *Gambling* (*d*) the House of Lords ruled, in effect (*e*), that awards based upon the objective aspect of it were to be moderate); and so they have been since. But in *West's Case* it was explained that the ruling in *Benham's Case*, where the plaintiff was a child of two and a half, killed outright in a motor accident, pertained only to this objective aspect of the claim; since there was no consciousness of lost expectation. And it seems that in cases where the plaintiff is living and conscious of the loss the subjective element may also be taken into account, as it may in respect of loss of amenity. It should be added that loss of the earnings that the plaintiff might have made during the period of lost expectation of life is not now included as a separate head of claim but forms part of the objective element in the lost expectation (*f*).

The moral justification for the granting of damages in respect of injuries of the kinds which have just been examined is doubtful. Surely, for instance, it is contrary to human dignity that a man should accept compensation in money for pain suffered or even—apart from the economic implications, which may be considerable—for loss of hearing, of sight, of expectation of life? In fact it is believed that awards of this kind can be justified neither upon a compensative theory of damages, which the courts profess to embrace, or, indeed, at all. DIPLOCK, L.J., may thus be excused the reflection that:

> "The award of damages should serve some useful purpose, but I am uncertain as to the social purpose which (this) award is intended to serve. . . . I suspect that its social purpose is to relieve the horror and

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(*c*) Since *Flint* v. *Lovell*, [1934] All E. R. Rep. 200; [1935] 1 K. B. 354. And in *Rose* v. *Ford*, [1937] 3 All E. R. 359; [1937] A. C. 826 it was held that this kind of claim was maintainable in favour of the estate of a deceased person under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (9 Halsbury's Statutes (2nd Edn.) 792).

(*d*) [1941] 1 All E. R. 7; [1941] A. C. 157.

(*e*) It was also ruled that damages for a child should be less than damages for an adult under this head.

(*f*) *Oliver* v. *Ashman* (last note) overruling *Pope* v. *D. Murphy & Son, Ltd.*, [1900] 2 All E. R. 873; [1961] 1 Q. B. 222.

anguish which ordinary human beings . . . cannot but feel when contemplating the state to which the victim has been reduced" (*g*).

If this be true strange it certainly is; since the giving of such damages must theoretically rest upon no firmer foundation than the social impulse to make "the wrongdoer" a scapegoat: a notion accepted in former times, but now discarded as a respectable theory of punishment by all penologists. A notion, moreover, which wears especially thin when it is remembered that torts are often matters of little (*h*) or no fault at all and that in most instances the defendant is in fact insured either by himself or, more usually, by his employer. It follows from the latter consideration that the thoughtless public (inasmuch as it knows what the courts are doing on its behalf) thus cuts off its nose to spite its face if excessive awards are made: for the people themselves must foot the bill in terms of heavier premiums (*i*) and, worse, face the inflationary effect upon all their living of mounting insurance costs (*k*). Moreover, it is by no means always the plaintiff himself who derives the benefit of the ritual money-giving: for in many cases the profits of the transaction accrue not to him but to his devisees or next-of-kin and Tomkins Junior buys a car (albeit a cheap one (*l*)) with the ritual payment for Senior's lost expectation of life (*m*).

There is, though some appear to dissent, a need for moderation (*n*)

(*g*) *Fletcher* v. *Autocar & Transporters, Ltd.*, [1968] 1 All E. R. 726, 744.

(*h*) How hard it is to ascribe "fault in running down actions; and how often the experienced driver doubts the correctness of the courts' decisions.

(*i*) See *Fletcher's Case* (above, n. (*g*)): pp. 733 (Lord DENNING, M.R.), 744 (DIPLOCK, L.J.), 750 (SALMON, L.J.). The latter, however, does not seem to mind.

(*k*) It is not merely fanciful to wonder whether the impact of awards might be of legitimate interest to the Prices and Incomes Board. This leads to the further political reflection that the courts may not be the most suitable agencies for assessing the *quantum* of damages; thence to the final reflection that the world of the future may replace the law of torts by overall insurance.

(*l*) £500 being the "conventional" sum.

(*m*) It is, as *Benham's Case* clearly suggests, an obvious pity that this head of damage ever received recognition, and the more the pity that the legalistic notion that the personal representatives continue the "*persona*" of the deceased dictated the ruling in *Rose* v. *Ford* (above, n. (*c*)). The imaginary case of the Tomkins' also illustrates the fact that the money paid not by the defendant but by an insurance company, actually goes in part not only not to Tompkins senior—since he is dead—but also, in part, not to his "estate" (thence to Junior), but by way of tax back to the State. In the ultimate of the cycle, of course, the "people", some of them at least, get back what they have paid by way of insurance in the form of "social benefits". DIPLOCK, L.J., did not (*Fletcher's Case*, p. 844) overlook these facts.

(*n*) See the judgment of DIPLOCK, L.J., in *Wise* v. *Kaye*, [1962] 1 All E. R. 257; [1962] 1 Q. B. 638 and the powerful dissenting speech of Lord DEVLIN in *West's Case* (n. (*b*) above).

in the matter of damages in personal injury cases, and the conventional "scales"—for a fist, a wrist or something less polite—should never become excessive (*o*), as long as such awards are made at all, meaningless as in themselves they are. Yet *economically* (*p*) the plaintiff must not be permitted to lose, and "economically" in the broadest sense. Thus perhaps a rational note was struck in *Fletcher* v. *Autocar & Transporters, Ltd.* (*q*), the case from which our last quotation came, in which the plaintiff, a successful quantity surveyor, was reduced to a state of moronic paralysis as the result of a motor accident. The Court of Appeal, in reducing the damages given at the trial, stressed that the total amount need not amount to as much as the aggregate of the various "heads" (amenity, bodily faculty, etc.), and envisaged the principal purpose of the award as being "... first to provide for the plaintiff's own maintenance ... secondly, to provide for ... his only dependant, enough to support her in the same material standard ... as she would have enjoyed had the plaintiff not been injured ..." (*r*). Though in line with tradition, and perhaps unhappily, a third proposition was added: "... to provide in addition the proper conventional sum to which the courts apply the label 'compensation for the loss of the amenities of life' ..." (*s*). Unhappily: for losses like these are not economic at all and money, except so far, and only except so far, as it may be required to supply the essential economic background for their enjoyment, is no substitute for them: much less is it a substitute for pain, injured pride or loss of life.

In awards of damages it is nevertheless proper to take monetary inflation into account, tariffs cannot remain fixed like payments for the Roman delict *injuria* (*t*); as prices do (and wages should) they must keep pace with the times. Thus the original "conventional" figure for loss of expectation of life was £200 or thereabouts: it is now £500, though the House of Lords (*u*) have refused an attempt

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(*o*) What MAITLAND called the "cynical doctrine of the long pocket" (in relation to 19th century railway companies) tends to multiply defendants in respect of vicarious liability—transport authorities, hospital authorities; and to inflate damages—insurance companies in running down actions.

(*p*) It should not be forgotten that the Fatal Accidents Acts sensibly restrict claims to dependants who, broadly speaking, stand to lose *economically* by the death.

(*q*) [1968] 1 All E. R. 726.

(*r*) *Ibid.*, p. 743; *per* DIPLOCK, L.J., p. 733; *per* Lord DENNING, M.R.

(*s*) *Ibid.*, at p. 743; *per* DIPLOCK, L.J.

(*t*) These were fixed by the Law of the Twelve Tables, and money value falling they subsequently became derisory.

(*u*) *Yorkshire Electricity Board* v. *Naylor*. [1967] 2 All E. R. 1; [1968] A. C. 529.

by the Court of Appeal (*a*) to raise it to £1,000. Similar increases have occurred under other "heads" (*b*).

Moreover, the incidence of taxation is something that the courts cannot overlook; and it has been ruled by the House of Lords in *British Transport Commission* v. *Gourley* (*c*) that the amount of tax which a successful plaintiff would have had to pay on future earnings must be taken into account by way of deduction from the damages he is to receive from the defendant whose tort has deprived him of the benefit of those earnings (*d*). For if damages are not punitive, "still less are they a reward" (*e*); and where the damages as such are not taxable in the hands of the plaintiff (*f*), he would be making a financial gain from the tort if, instead of receiving the amount of the *taxed* earnings which he would have had if it had not been committed, he were to receive an amount equivalent to *gross* earnings, before deduction of tax. It will be realized that the effect of this decision may make a very considerable difference to the amount of the award. Thus in *Gourley's Case* itself, where a civil engineer was seriously injured in a railway accident, the assessment of the lost *gross* earnings, actual and prospective, was £37,720; the assessment after deduction of tax (the amount in the event allowed) was £6,695 (*g*).

(*a*) *Naylor* v. *Yorkshire Electricity Board*, [1966] 3 All E. R. 327; [1967] 1 Q. B. 244.

(*b*) See *e.g. Senior* v. *Barker and Allen, Ltd.*, [1965] 1 All E. R. 818; *Miller* v. *British Road Services, Ltd.*, [1967] 1 All E. R. 1027 n. For all current figures Kemp and Kemp, *The Quantum of Damages*, should be consulted.

(*c*) [1955] 3 All E. R. 796; [1956] A. C. 185. The principle applies not only to claims in tort—including claims for loss of profits in libel actions, where such claims are relevant (*Lewis* v. *Daily Telegraph, Ltd.*, [1963] 2 All E. R. 151; [1964] A. C. 234)—but also to claims for loss of profits upon compulsory purchase; *West Suffolk County Council* v. *Rought, Ltd.*, [1956] 3 All E. R. 216; [1957] A. C. 403: *Thomas McGhie & Sons* v. *British Transport Commission*, [1962] 2 All E. R. 646; [1963] 1 Q. B. 125) and claims for damages in contract for wrongful dismissal (*Re Houghton Main Colliery Co., Ltd.*, [1956] 3 All E. R. 300: *Parsons* v. *B.N.M. Laboratories, Ltd.*, [1963] 2 All E. R. 658; [1964] 1 Q. B. 95; *Bold* v. *Brough, Nicholson and Hall, Ltd.*, [1963] 3 All E. R. 849).

(*d*) But the rule only applies where the lost earnings *are* taxable and the damages are *not*: see *Diamond* v. *Campbell-Jones*, [1960] 1 All E. R. 583; [1961] Ch. 22 and *Parson's Case* (last note) at p. 678, *per* PEARSON, L.J. and authorities there cited.

(*e*) [1955] 3 All E. R. 796, 805; [1956] A. C. 185, 208; *per* Lord GODDARD.

(*f*) In some cases they *may* be. See *Wiseburgh* v. *Domville* (*Inspector of Taxes*), [1956] 1 All E. R. 754; *Hall & Co., Ltd.* v. *Pearlberg*, [1956] 1 All E. R. 297 (n).

(*g*) The exact amount to be deducted in respect of future taxation is, of course, incalculable and it may sometimes be proper to make an estimate which is generous to the plaintiff: *The Telemachus*, [1957] 1 All E. R. 72; [1957] P. 47.

But the principle underlying *Gourley's Case* goes further than this, for

> "The award of damages is made to compensate (the plaintiff), not to punish the wrongdoer. That is now settled by *British Transport Commission* v. *Gourley* (*h*). He should therefore give credit for all sums which he receives in diminution of his loss, save in so far as it would not be fair or just to require him to do so" (*i*).

After saying this Lord DENNING, M.R., then went on to explain that the difficulty is to know when it would be just or fair to do so. It clearly is not fair to reduce the plaintiff's damages by a benefit he receives from a charitable gift made to him (*k*), nor by the amount of insurance benefits that he has acquired by the payment of premiums out of his own pocket (*l*), nor by reason of the payment of sums advanced to him which he is legally obliged to repay (*m*), and it might not be fair to deduct sums provided to him by third parties which he is under a moral obligation to repay (*n*). The problem is, however, a complex one which is currently engaging the attention of the courts. Shortly, two principles at least seem to be emerging. First, that (as in the case of insurance) it is not proper to deduct any benefit which arises from the plaintiff's own thrift, but it is proper to deduct a benefit which accrues to him from payments made by others (such as his employer) (*q*) or by the State (*r*). Secondly, though this principle has received much criticism (*s*), where a disability pension becomes payable as the result of an injury the amount of it must be taken into account if the payment of it is obligatory

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(*h*) [1955] 3 All E. R. 796; [1956] A. C. 185.

(*i*) *Browning* v. *War Office*, [1962] 3 All E. R. 1089, 1091; [1963] 1 Q. B. 750, 758–759; *per* Lord DENNING, M.R.

(*k*) *Redpath* v. *Belfast and County Down Rail. Co.*, [1947] N. I. 167.

(*l*) *Bradburn* v. *Great Western Rail Co.* (1874), L. R. 10 Exch. 1. Why a distinction is made between insurance privately effected and insurance arising from contributory schemes is by no means clear. The various reasons suggested in *Parry* v. *Cleaver*, [1967] 2 All E. R. 1768; [1968] 1 Q. B. 195 should be noted, but they are far from convincing.

(*m*) *Inland Revenue Commissioners* v. *Hambrook*, [1956] 1 All E. R. 807; [1956] 2 Q. B. 641, affirmed, [1956] 3 All E. R. 338; [1956] 2 Q. B. at p. 658.

(*n*) *Dennis* v. *London Passenger Transport Board*, [1948] 1 All E. R. 779; *Schneider* v. *Eisovitch*, [1960] 1 All E. R. 169; [1960] 2 Q. B. 430. But see *Gage* v. *King*, [1960] 3 All E. R. 62; [1961] 1 Q. B. 188.

(*q*) Thus national insurance *contributions* partially payed by the employer have been held to be deductible: *Cooper* v. *Firth Brown*, [1963] 2 All E. R. 31.

(*r*) Thus in *Parsons* v. *B.N.M. Laboratories, Ltd.*, [1963] 2 All E. R. 658 unemployment *benefit* was held to be deductible in a case of wrongful dismissal and this was followed in *Foxley* v. *Olton*, [1964] 3 All E. R. 248; [1965] 2 Q. B. 306 in a personal injuries case—*unemployment* benefit not coming within the Law Reform (Personal Injuries) Act 1948, s. 2 (1).

(*s*) See *Parsons' Case* (last note) and *Browning* v. *War Office*, [1962] 3 All E. R. 1089; [1963] 1 Q. B. 750 where *Payne* v. *Railway Executive*, [1951] 2 All E. R. 910 is criticized.

as being incidental to the plaintiff's employment (*t*), but may be disregarded if it is merely discretionary (*u*). It would be idle to comment on these principles since what is "fair" is a matter of opinion.

Finally, it must be noted that the passing of the National Insurance Acts, beginning with the National Insurance Act, 1946, and the National Insurance (Industrial Injuries) Act, 1946, created a difficulty (*a*) in respect of the assessment of damages for loss of earnings or profits in personal injury cases. For these Acts brought into being a system of national insurance whereby certain benefits become payable by the State when such injuries are received. The question was whether receipt of these benefits should affect the rights of an injured person to bring an action *at common law* against someone who had wrongfully caused the injury in respect of which the benefits are payable. The difficulty was met by the Law Reform (Personal Injuries) Act, 1948, s. 2 (1), which provided that

> "In an action for damages for personal injuries (*b*) . . . there shall in assessing those damages *be taken into account* (*c*), *against any loss of earnings or profits* which has accrued or probably will accrue to the injured person from the injuries, *one half of the value of any rights* which have accrued or probably will accrue to him therefrom *in respect of industrial injury benefit, industrial disablement benefit or sickness benefit* (*d*), *for the five years beginning with the time the cause of action accrued*" (*e*).

This means that, despite the new benefits obtainable under the National Insurance Acts in respect of injuries, a common law claim is also still maintainable, but that, in assessing the damages in such an action a deduction must be made from any special damages awarded in respect of loss of earnings or profits of *one half* of the insurance benefits which the injured person has received, or is likely

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(*t*) *Browning's Case* (last note): *Parry's Case* (above, n. (*l*)).

(*u*) *Payne* v. *Railway Executive*, [1951] 2 All E. R. 910; *Carroll* v. *Hooper*, [1964] 1 All E. R. 845; *Elstob* v. *Robinson*, [1964] 1 All E. R. 848. Compare *Judd* v. *Board of Governors of the Hammersmith, West London and St. Mark's Hospitals*, [1960] 1 All E. R. 607—pension arising from superannuation scheme not taken into account.

(*a*) Formerly under the insurance system of the Workmen's Compensation Act, 1925, the difficulty was obviated by forcing the injured workman to elect between claiming under the Act *or* proceeding with a common law action.

(*b*) By s. 3 the Act defines "personal injuries" so as to include "any disease and any impairment of a person's physical or mental condition".

(*c*) For the interpretation of these words see *Stott* v. *Sir William Arrol & Co., Ltd.*, [1953] 2 All E. R. 416; [1953] 2 Q. B. 92; *Flowers* v. *George Wimpey & Co. Ltd.*, [1955] 3 All E. R. 165; [1956] 1 Q. B. 73.

(*d*) For a description of these benefits see 16 Halsbury's Statutes (2nd Edn.) 641, title *National Insurance and Social Security*.

(*e*) Italics ours. As to the basis of assessment under this section see *Hultquist* v. *Universal Pattern and Precision Engineering Co.*, [1960] 2 All E. R. 266; [1960] 2 Q. B. 467.

to receive, up to the terminal five-year period (*f*). The difficulty which the National Insurance Acts create is thus solved by means of a compromise.

It is further to be noted that the Law Reform (Personal Injuries) Act, 1948, s. 2 (4) (*g*), provides that in determining the reasonableness of any expenses incurred by the plaintiff, the fact that he might have avoided or reduced them by taking advantage of the medical facilities available under the National Health Service shall be disregarded.

(b) Damages for Injuries to Property

Here, again, compensation is the basic principle. Thus the value of the property which the defendant has damaged or of which he has deprived the plaintiff has to be assessed; and, in addition, any necessary expenses incurred as a direct result of the tort have to be taken into account (*h*).

The actual method of assessment, or "measurement", of damages must, of course, vary according to circumstances, but some examples may serve to illustrate how the problem is approached.

Injuries to real property.—The cardinal rule in actions for trespass to real property is that the measure of damages is the loss the plaintiff has sustained, and not the benefit that may have accrued to the defendant from his tort. It may often be easy to arrive at a figure which represents this loss; for instance, if the defendant drives his car upon the plaintiff's field, crushing his wheat, it will be reasonably simple to assess the proper sum to award. But (even disregarding the possibility of exemplary damages) this will not always be so. For instance in a case (*i*) where the defendant cut a ditch across the plaintiff's land, the court, faced with a choice, held that the proper measure of damages was the diminution in the value of the land, rather than the cost of restoring it to its original state. And where coal has been taken by working into the mine of an adjoining owner

(*f*) The Law Reform (Personal Injuries) Act, 1948, s. 2 (3), provides that, in cases of contributory negligence on the part of the plaintiff the statutory deduction is to be made from the gross amount which would have been recovered apart from the contributory negligence, not from the net amount assessed when its effect has been taken into account.

(*g*) 25 Halsbury's Statutes (2nd Edn.) 364.

(*h*) *Rust* v. *Victoria Graving Dock Co. and London and St. Katharine Dock Co.* (1887), 36 Ch. D. 113; *Liesbosch Dredger* v. *S.S. Edison*, [1933] A. C. 449.

(*i*) *Jones* v. *Gooday* (1841), 8 M. & W. 146; *Hosking*, v. *Phillips* (1848), 3 Exch. 168. But it may be bearing in mind that rules as to measure of damages should not be rigid: see *The Susquehanna*, [1926] A. C. 655, 662; *per* Viscount Dunedin—that diminution in value should not invariably be preferred to that of repair. See *Hollebone, Midhurst and Fernhurst Builders, Ltd.* and *Eastman & Waite of Midhurst, Ltd.*, [1968] 1 Lloyd's Rep. 38.

the damages will be assessed as against the trespasser according to the value which a purchaser would pay for the coal at the pit's mouth, less the cost of raising it to the surface, so as to place the owner in the same position as if he had himself severed it (*k*).

Where the injury to the plaintiff's land consists in depriving him of the use of it, the value of this deprivation may also have to be assessed. And this is by no means always a simple matter. Thus in *Whitwham* v. *Westminster Brymbo Coal and Coke Co.* (*l*), where the defendants had for years wrongfully tipped spoil from their colliery upon the plaintiff's land, it was held that, by way of exception to the general principle to the contrary, the only possible measure of damages was the value of the land to the defendants themselves for tipping purposes, and not the diminution of its value to the plaintiff (*m*).

Injuries to personal property.—Where the tort concerned consists in depriving the plaintiff *permanently* of his personal property, the general rule is that the measure of damages is the full market value (*n*) of the property at the time of the commission of the wrong (*o*). And where property is damaged he must pay such an amount as will make good the damage; but if at the time of the wrong the property is already damaged by the fault of some other person and has not been repaired then the defendant cannot be made to pay for the cost of the repair for which the other person is liable. Thus in *Performance Cars, Ltd.* v. *Abraham* (*p*) the plaintiffs' Rolls Royce had been damaged in a collision and this damage (though

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(*k*) In *Re United Merthyr Collieries Co.* (1872), L. R. 15 Eq. 46; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25.

(*l*) [1896] 2 Ch. 538.

(*m*) See also the "way-leave" cases: *Martin* v. *Porter* (1839), 5 M. & W. 351; *Jegon* v. *Vivian* (1871), 6 Ch. App. 742; *Phillips* v. *Homfray* (1871), 6 Ch. App. 770.

(*n*) Where, for any reason, the market value cannot be ascertained some other measure must be taken; such as the price for which the plaintiff has in fact agreed to resell the goods: *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199 (rare champagne). Further, where a person who has wrongfully converted something refuses to produce it, it will be presumed to have been of the best description: *Armory* v. *Delamirie* (1722), 1 Stra. 505. Similarly, where part of a diamond necklace was traced to the defendant, it was held that the jury might infer that the whole of it had come into his hands: *Mortimer* v. *Cradock* (1843), 12 L. J. C. P. 166.

(*o*) And the plaintiff will not normally be entitled to recover more than this: for instance he will not be able to recover the full cost of repairs if they exceed the market value. See *Darbishire* v. *Warran*, [1963] 3 All E. R. 310. Moreover, the market value of a document which is not a negotiable instrument is its value as a piece of paper, not the value of any rights or claims to which its use may give rise: *Building and Civil Engineering Holidays Scheme Management, Ltd.* v. *Post Office*, [1964] 2 All E. R. 25; [1964] 2 Q. B. 430.

(*p*) [1961] 3 All E. R. 413; [1962] 1 Q. B. 33. And see *The Haversham Grange*, [1905] P. 307.

slight) necessitated in the case of a Rolls Royce the respraying of the whole of the lower part of the body. The plaintiffs had obtained judgment against the owner of the other car involved which was unsatisfied. The car was thereafter in collision with the defendant's car before the respraying had been done, and the collision was caused by the defendant's negligence. It was held that the plaintiffs could not recover from the defendant in respect of the need to respray since, in effect, they had suffered no damage as a result of his negligence (*q*). Further, in such a case the first wrongdoer will remain liable for the damage he has caused even though the second wrongdoer causes more damage in excess of it. This was vividly illustrated in *Baker* v. *Willoughby* (*r*) a personal injuries case, where the defendant who had negligently injured the plaintiff was held not to have been obsolved from his liability by the subsequent action of robbers in inflicting more serious injury upon the plaintiff before the date of the trial. A similar principle would clearly apply in the case of damage to a chattel. For the plaintiff's part, however, he cannot recover more than he has actually lost. So it was held in *Wickham Holdings, Ltd.* v. *Brooke House Motors, Ltd.* (*s*) that where a hire purchaser converts a car by selling it a plaintiff finance company must deduct from its claim for damages any money paid by the firm under the agreement prior to the conversion.

But the assessment of the value of the property does not invariably relate to the time of the wrong. Thus though it does so in the case of a claim for conversion (*t*)—since conversion consists in a single wrongful act—it does not do so in the case of detinue, for here the claim is a claim *in rem*, a proprietary claim (*u*), and the wrong continues to the time of judgment at which time the assessment must be made (*a*).

(*q*) Contrast *Shearman* v. *Folland*, [1950] 1 All E. R. 976; [1950] 2 K. B. 43.

(*r*) [1968] 2 All E. R. 236.

(*s*) [1967] 1 All E. R. 117 applying *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K. B. 244; disapproving *United Dominions Trust (Commercial), Ltd.* v. *Parkway Motors, Ltd.*, [1955] 2 All E. R. 557.

(*t*) *Reid* v. *Fairbanks* (1853), 13 C. B. 692, 729. Though property in the goods remains in the plaintiff until judgment is satisfied: *Ellis* v. *John Stenning & Son*, [1932] All E. R. Rep. 597; [1932] 2 Ch. 81.

(*u*) See Holdsworth, *History of English Law*, Vol. VII, 438–439.

(*a*) *Rosenthal* v. *Alderton & Sons, Ltd.*, [1946] 1 All E. R. 583; [1946] K. B. 374: *Jarvis* v. *Williams*, [1955] 1 All E. R. 108: *General and Finance Facilities, Ltd.* v. *Cooks Cars (Romford), Ltd.*, [1963] 2 All E. R. 314. Where (differing from Lord GODDARD, C.J., in *Sachs* v. *Miklos*, [1948] 1 All E. R. 67, 69; [1948] 2 K. B. 23, 38) DIPLOCK, L.J., ruled that even where the same act—as in the case of a refusal by the defendant to return goods in his possession upon demand—may ground a claim in both detinue and conversion the measure of damages may, upon the above principles, differ according to the nature of the claim.

In detinue, moreover, since the plaintiff may claim the return of his chattel or recovery of its value, the assessment of the value must be made separately from the amount assessed by way of damages for its detention (which latter claim, as well as the claim to the value of the chattel, may lie both in detinue and conversion) since if the chattel is not redelivered the plaintiff has, after judgment, the right of proceeding by writ of delivery to distrain for its value: and this value must therefore be quantified (*b*).

Further, even in the case of conversion, if the value of the property converted has risen between the time of the act of conversion, or of the refusal to deliver, and the time of judgment, the plaintiff is (as in the case of detinue) entitled to have the damages assessed according to their value at the *latter* time (*c*).

But whether the cause of action be in conversion or in detinue, if the plaintiff is to be allowed the advantage of the rule that his loss may be assessed by reference to the value at the date of judgment, he must, as will be readily appreciated, bring his claim with reasonable promptitude *once he knows of his loss* (*d*); if this were not so, he might purposely increase his damages by waiting until the market favoured him.

Where the result of the tort is to deprive the plaintiff *temporarily* of the use of personal property he is entitled to recover not only by way of special damage all necessary expenses (*e*), such as the cost of repairs, or the cost of hiring another article to take its place during the period of loss, but also to recover damages for loss of the use itself, even though it is difficult to place an economic value upon it (*f*), for

> "where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or

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(*b*) *General and Finance Facilities, Ltd.* v. *Cooks Cars (Romford), Ltd.* (last note). See pp. 317–320; *per* DIPLOCK, L.J., where the nature of the various forms of judgment in detinue is explained.

(*c*) But if the increase in value is due to work of, or expenditure by, the defendant, the plaintiff is, of course, not entitled to the benefit of this: *Munro* v. *Willmott*, [1948] 2 All E. R. 983; [1949] 1 K. B. 295; *Reid* v. *Fairbanks* (1853), 13 C. B. 692.

(*d*) *Sachs* v. *Miklos*, [1948] 1 All E. R. 67; [1948] 2 K. B. 23.

(*e*) *The Okehampton*, [1913] P. 54, 173; *Liesbosch Dredger* v. *S.S. Edison*, [1933] A. C. 449; *A.M.F. International, Ltd.* v. *Magnet Bowling, Ltd.*, [1968] 2 All E. R. 789.

(*f*) *Owners of No. 7 Steam Sand Pump Dredger* v. *Owners of S.S. Greta Holme, The Greta Holme*, [1897] A. C. 596 (Illustration 133): *Admiralty Commissioners* v. *S.S. Chekiang*, [1926] A. C. 637: *The Hebridean Coast, Owners of Lord Citrine* v. *Owners of Hebridean Coast*, [1961] 1 All E. R. 82; [1961] A. C. at p. 570. But it may sometimes be possible to quantify the value of the loss of use specifically; see *The Fortunity, Owners of Motor Cruiser Four of Hearts* v. *Owners of Motor Vessel or Motor Ship Fortunity*, [1960] 2 All E. R. 64.

is taken away so that it cannot be used at all, that of itself is a ground for damage" (*g*).

Such damages may usually be assessed by the probable cost of hiring a replacement for the damaged article for the period of loss (*h*); and may be recoverable even though no such hiring has in fact taken place. They may be small, but technically they are not "nominal" but "substantial" (*i*).

ILLUSTRATION 136

Damages may be awarded for the loss of use of an article damaged by the defendant's tort even though the plaintiff has suffered no damage beyond the loss of use itself.

Owners of No. 7 Steam Sand Pump Dredger *v.* Owners of S.S. Greta Holme, The Greta Holme, [1897] A. C. 596.

Appellants were trusteees charged with the duty of maintaining a harbour. Owing to a collision, in which respondents' ship was at fault, a dredger belonging to appellants was damaged; and they were deprived of the use of it for some weeks. *Held:* Although appellants could show no actual economic loss from the collision, since they derived their funds from the rates (and this dredger was not a profit-earning vessel) they were nevertheless entitled to £500 damages, purely for the loss of use.

3. REMOTENESS OF DAMAGE

In the last Section on the assessment of damages it was assumed that the various heads of damage discussed were so related to the defendant's wrong as to be attributable to it. This Section concerns the issue of remoteness of damage—that is to say, "Is the damage complained of to be considered attributable to the defendant's wrong or is it to be considered too remote from it to be attributed to it?"

Remoteness of damage in relation to the tort of negligence has already been considered (*k*). And here the reader need only be reminded briefly that the decision in *The Wagon Mound* (*No.* 1) (*l*) must be taken to have settled the much disputed question whether a particular item of damage arising from the defendant's negligence must be one which he ought *reasonably to have anticipated* or whether it need only be one which follows *directly* upon the wrong (though not foreseeable), in favour of the "foresight" rule. And further

(*g*) *Owners of Mediana* v. *Owners of Comet, The Mediana*, [1900] A. C. 113, *per* Earl of HALSBURY, L.C.

(*h*) [1900] A. C. 113 at p. 117. (*i*) *Ibid.*, pp. 116–117.

(*k*) Above, pp. 209–213.

(*l*) *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock and Engineering Co., Ltd.* (*The Wagon Mound*), [1961] 1 All E. R. 404; [1961] A. C. 388.

reminded that this proposition is subject both to exception and to qualification. For, by way of exception, *Smith* v. *Leech Braine & Co., Ltd.* (*m*) rules that "direct consequence" (*n*) still prevails where the damage ultimately caused is similar in type to damage foreseeably caused upon which the claim is founded; by way of qualification *The Wagon Mound* (*No.* 2) (*o*) rules that "foresight" may at times be a very foresighted thing, embracing consequences so improbable that the effect of the application of either rule ("foresight" or "direct consequence") becomes practically identical.

This, then, is the position, surprising though some may consider it, in relation to remoteness of damage as far as it concerns the tort of Negligence. Since we are here concerned not just with Negligence but with torts at large we must now consider the broader picture. One thing is sure, that if the defendant *intended* the harm in question he will be responsible for it; since intention to cause the harm "*disposes of any question of remoteness of damage*" (*p*). Thereafter there is little but obscurity, though *The Wagon Mound* (*No.* 2) casts some light; for it rules that the "foresight" principle (*q*) applies to *Nuisance* of all kinds as well as to Negligence—subject again presumably to the above-mentioned exception and certainly to the qualification. Beyond this proposition it would be dangerous to venture dogmatically. The current appetite of the courts for "foresight" may suggest that if and when the point arises *The Wagon Mound* (*No.* 1) will be held to prevail (*r*) in the case of any tort involving lack of care. Yet it may be that the "direct consequence" rule may still be held to govern in the case of torts of strict (*s*) liability, and that in the case of such torts (and possibly in the case of some others as well) damage may still be not too remote

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(*m*) [1961] 3 All E. R. 1159.

(*n*) *I.e.* the rule in *In re Polemis and Furness, Withy & Co., Ltd.*, [1921] All E. R. Rep. 40; [1921] 3 K. B. 560. The facts were as peculiar as those of *The Wagon Mound*. Appellants chartered the ship *Thrassyvoulos* from respondents. She was loaded with a cargo of cases containing petrol and her hold became full of petrol vapour. While she was in Casablanca harbour appellants employed some Arab stevedores to shift her cargo; while thus engaged one of these stevedores carelessly caused a plank to fall into the hold; this somehow (unknown) produced a spark, and the vapour igniting the ship became a total loss in the ensuing fire.

(*o*) *The Wagon Mound* (*No.* 2), [1966] 2 All E. R. 709; [1967] A. C. 617.

(*p*) *Quinn* v. *Leathem*, [1901] A. C. 495, 537; *per* LINDLEY, L.J.

(*q*) Of *The Wagon Mound* (*No.* 1).

(*r*) *I.e.* the "foresight" principle.

(*s*) *E.g. Rylands* v. *Fletcher* liability, cattle trespass, absolute statutory liability, etc.

if it is directly caused (*t*) by the defendant without extraneous intervention (*u*).

It must not be forgotten that in practice the controversies that have arisen as to the superiority of the *Wagon Mound* or the *Polemis* rule are really a storm in a teacup since in ninety-nine cases out of a hundred (the facts of these cases being almost phenomenal) whichever rule is applied a similar result will be reached; for most *direct* consequences can usually be foreseen, or at least by the covert intervention of considerations of policy (*u*), be brought within the ambit of reasonable foresight.

Two further points are sufficiently important to deserve notice.

First, it must not be assumed that damage must necessarily arise from a *single* cause; causes may well be concurrent, and operate together (*a*). When this does happen difficult questions may arise; but it is felt that this topic lies beyond the scope of an elementary work.

Secondly, it must not be assumed that damage will necessarily be treated as remote and unrecoverable because it is not damage which would in itself, and apart from the commission of the tort actually committed, be damage of a kind remediable at law (*"damnum sine injuria"*). In fact—though perhaps rather strangely—what are sometimes called *"parasitic"* damages may be recovered for injury of this kind which follows from the commission of an *established tort* (*b*). Thus for example, the law does not protect the amenity afforded by an uninterrupted view as a legal right. But in *Campbell* v. *Paddington Corporation* (*c*), the plaintiff was awarded damages against the Corporation upon the basis of the loss of profit she would have made by providing people with seats at the windows of her house to view the funeral procession of King Edward VII. The facts were that the Corporation created a public nuisance by erecting a stand for the benefit of their own officials in front of the plaintiff's house, and since this blocked the view, the plaintiff lost her customers! The nuisance once being established, the plaintiff's loss of view came within the ambit of compensation as "parasitic" damage (*d*).

(*t*) But *caused* it must be. The question of causation has been considered.

(*u*) See comments above, pp. 37, 169.

(*a*) See *Hill* v. *New River Co.* (1868), 9 B. & S. 303; *Burrows* v. *March Gas & Coke Co.* (1872), L.R. 7 Exch. 96; *Smith* v. *Harris*, [1939] 3 All E. R. 960; *Clay* v. *A. J. Crump & Sons, Ltd.*, [1963] 3 All E. R. 687.

(*b*) For fuller discussion see Street, *Principles of the Law of Damages*, pp. 26–28.

(*c*) [1911] 1 K. B. 869.

(*d*) See also *Stroyan* v. *Knowles* (1861), 6 H. & N. 454; *Horton* v. *Colwyn Bay Urban District Council*, [1908] 1 K. B. 327, 341; *per* BUCKLEY, L.J.: *Griffith* v. *Richard Clay & Sons, Ltd.*, [1912] 2 Ch. 291.

4. CONTINUING TORTS

These require separate mention because the rule with regard to the recovery of damages in respect of them forms a major qualification of the general rule that all damages, accrued and prospective, must be recovered in one action.

A continuing tort is one that is not committed all at once (as for instance when B hits A in the face), but which continues. Obvious examples are the case of false imprisonment, where the plaintiff is incarcerated for a period of time (*e*), or continuing trespass, as where the defendant puts his property upon the plaintiff's land and fails to remove it (*f*). In the case of torts of this nature, when an action is brought while the tort is still continuing, the rule is that only *such damage as has been suffered up to the time when damages are assessed* (*g*) *in the action is to be taken into account.* Prospective damages must not and cannot be awarded because, amongst other considerations, it remains at the time of judgment a matter of conjecture when the defendant will choose to desist from his wrongdoing. If the tort does thereafter continue then a further action or actions may lie until the defendant does so desist.

This general statement requires to be elaborated in two ways.

First, where in the case of a continuing tort damages are awarded in lieu of an injunction, under the statutory authority originally afforded by Lord Cairns' Act, 1858 (*h*), these damages *may*, by way of exception, be assessed in respect of prospective damage as well as of accrued damage. The reason for this is that the purpose of refusing the injunction and granting damages instead is to allow the defendant's activity to continue, while compensating the plaintiff for his loss both actual and prospective.

Secondly, torts which cause, not continuous, but "successive" or "intermittent" damage give rise to difficulty. Suppose for example that a man by *trespass* removes minerals from beneath another's land, and that later and at intervals successive subsidences of the land occur. Or suppose that A having said to B that C is a swindler, B refuses to enter into a contract with C; that D, who was present, heard it, and also subsequently refuses to make such a contract, or

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(*e*) See, *e.g. Hardy* v. *Ryle* (1829), 9 B. & C. 603.

(*f*) See *Konskier* v. *B. Goodman, Ltd.*, [1928] 1 K. B. 421.

(*g*) R. S. C., Ord. 37, r. 6. At common law the assessment was made only up to the time of issue of writ: See notes to *Hambleton* v. *Vere* (1670), 2 Wms. Saund. 169 (1871 Edn.), p. 491.

(*h*) Section 2. Otherwise called Chancery Amendment Act, 1858. The Act is repealed, but the jurisdiction created is now exercised under the powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 37 (18 Halsbury's Statutes (2nd Edn.) 472).

even that B later refuses another contract with C (*i*). In each of these cases the damage is not continuous but intermittent. If action is brought after the first damage has occurred must prospective damage be taken into account? Or, as in the case of continuing torts, will there be a separate right to claim in respect of each item of damage as it arises?

The answer to this question depends upon the nature of the tort. Where the tort (as in the first example given) is one which is actionable *per se* there seems no doubt that the ordinary rule prevails, and that the assessment must include prospective as well as accrued damage (*k*); for the gist of the action lies in the defendant's wrongful act, which has been committed once and for all. But where (as in the second example) the tort is one which is only actionable upon proof of special damage the answer is not so clear. All that can be said with certainty is that in the limited field of subsidences caused by *removal of support* to land (where the cause of action lies not in trespass, no trespass having been committed (*l*), but in the removal of support itself), the House of Lords has ruled in *Darley Main Colliery* v. *Mitchell* (*m*) and *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe and Hampson, Ltd.* (*n*), that a new cause of action arises as each fresh subsidence occurs, and that damages are therefore to be assessed not prospectively, but up to date of judgment, later subsidences giving rise to later claims.

ILLUSTRATION 137

Prospective damages are not awarded in the case of continuing torts, since further actions can be brought as long as the continuance lasts.

Holmes *v.* Wilson (1839), 10 Ad. & El. 503.

Trustees of a turnpike road built buttresses to support it on plaintiff's land. Plaintiff sued for the trespass, and received money paid into court in satisfaction. The buttresses were, however, not then removed. *Held:* Plaintiff was entitled to bring a further action for the continuing trespass (*o*).

(*i*) See *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, 145; *per* Lord BRAMWELL.

(*k*) *Ibid.* And see *Clegg* v. *Dearden* (1848), 12 Q. B. 576; *Spoor* v. *Green* (1874), L. R. 9 Exch. 99.

(*l*) The case is, therefore, different from the example given above and the authorities cited in note (*a*) above do not apply.

(*m*) (1886), 11 App. Cas. 127.

(*n*) [1908] A. C. 27.

(*o*) See also *Konskier* v. *B. Goodman, Ltd.*, [1928] 1 K. B. 421.

CHAPTER 3

INJUNCTIONS IN RESPECT OF TORTS

1. THE KINDS OF INJUNCTIONS

An injunction is an order of the court restraining the commission or continuance of some act (*a*).

An injunction may be granted in all cases in which it appears to the court just and convenient that such order shall be made (*b*), (*c*).

Injunctions may be mandatory or prohibitory; perpetual or interlocutory. A *mandatory* injunction is an injunction granted to compel the performance of some positive act, *e.g.* the removal of work already executed. A *prohibitory* injunction is one which is granted to prohibit the doing of an act, *e.g.* the erection of a building. A *perpetual* injunction is one which is granted after the facts of a case have been fully tried, and is given by way of final relief. An *interlocutory* injunction is a temporary injunction granted summarily on motion; that is an application in open court (*d*), founded upon an affidavit, and made before the facts in issue have been formally tried. Such an injunction is granted to restrain the commission or continuance of some act and maintain the *status quo* until the court has decided whether a perpetual injunction ought to be granted.

The remedy by way of injunction was first adopted by the Chancellors and provided only in Courts of Equity; notably the Court of Chancery. It was not obtainable in the old common law courts. But in the process of the great reforms of the nineteenth century, the common law courts were given limited powers to

(*a*) Reference should be made to specialized works, such as Kerr on *Injunctions*.

(*b*) Supreme Court of Judicature (Consolidation) Act, 1925, s. 45 (1) (18 Halsbury's Statutes (2nd Edn.) 472), replacing Supreme Court of Judicature Act, 1873, s. 25 (8).

(*c*) The proper remedy against the *Crown* is by way of declaratory order; an injunction will not lie: Crown Proceedings Act, 1947, s. 21 (1) (a) and (2) (6 Halsbury's Statutes (2nd Edn.) 61). See also *Harper* v. *Home Secretary*, [1955] 1 All E. R. 331; [1955] Ch. 238; *Merricks* v. *Heathcoat-Amory*, [1955] 2 All E. R. 453; [1955] Ch. 567.

(*d*) In the Queen's Bench Division applications for interlocutory injunctions are made by summons in chambers.

administer this remedy as well as their own remedy of damages (*e*). Conversely, by Lord Cairns' Act, 1858 (*f*), the Court of Chancery was empowered in all cases where it had jurisdiction to grant an injunction against the commission of a wrongful act, in its discretion, to award damages to the party injured, either in addition to, *or in substitution for*, such injunction. When the system of the courts was reformed by the Judicature Acts, 1873–5, all Divisions of the High Court of Justice were empowered to grant all remedies (*g*), whether legal or equitable, and the powers originally conferred by Lord Cairns' Act were also passed to them (*h*). The County Courts also now have power to grant injunctions (*i*).

2. CONDITIONS UNDER WHICH INJUNCTIONS ARE GRANTED

Injunctions, in common with other remedies springing from the Chancellor's equitable jurisdiction, are not granted as of right but only subject to the *discretion of the court*. An injunction will not therefore be granted where it would be *vain* to grant it (that is to say, calling upon the defendant to do the impossible); thus where a local authority were committing a nuisance by sewage pollution an injunction against them was refused—though damages were awarded—because it was legally impossible for them to stop up the sewers or prevent people from using them (*k*). Further, he who seeks Equity must do Equity; and the plaintiff must come to the court with reasonable promptness, and come with clean hands.

But it must not be supposed that this discretion will be tenderly exercised in favour of the defendant, for

> "It is . . . well settled that, if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to

(*e*) Common Law Procedure Act, 1854 (18 Halsbury's Statutes (2nd Edn.) 435).

(*f*) Chancery Procedure Amendment Act, 1858, s. 2 (18 Halsbury's Statutes (2nd Edn.) 456).

(*g*) Supreme Court of Judicature (Consolidation) Act, 1925, ss. 36–43 (18 Halsbury's Statutes (2nd Edn.) 467), replacing similar provisions of the Supreme Court of Judicature Act, 1873.

(*h*) Section 2 of this Act was, in fact, repealed by the Statute Law Revision and Civil Procedure Act, 1883, s. 3, and Schedule, but the jurisdiction it conferred remained. See 18 Halsbury's Statutes (2nd Edn.) 456, and *Leeds Industrial Co-operative Society, Ltd.* v. *Slack*, [1924] A. C. 851, 861–3; *per* Viscount FINLAY.

(*i*) County Courts Act, 1934, s. 71 (5 Halsbury's Statutes (2nd Edn.) 61). But see the *County Court Practice*, notes to Supreme Court of Judicature (Consolidation) Act, 1925, s. 45, and authorities there cited.

(*k*) *A.-G.* v. *Dorking Union* (1882), 20 Ch. D. 595. See also *Earl of Harrington* v. *Derby Corporation*, [1905] 1 Ch. 205: contrast *Haigh* v. *Deudraeth Rural District Council*, [1945] 2 All E. R. 661.

continue his wrong, then A is *primâ facie* entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist" (*l*).

And, as a matter of general principle, in keeping with the maxim of Equity that "Equity fulfils the law", an injunction will usually be granted to prevent the violation of a legal right (*m*) in all cases (*n*) where the injury sustained is not susceptible of being adequately compensated by an award of damages (*o*), or at least not without the necessity of a multiplicity of actions for that purpose. And even considerations of public convenience will not provide a sufficient reason for depriving the plaintiff of his rights in derogation of this principle (*p*).

So, in *Shelfer* v. *City of London Electric Lighting Co.* (*q*), it was argued that damages in lieu of an injunction ought to be granted by virtue of the powers conferred upon the court by Lord Cairns' Act in favour of the defendants, who were electricity undertakers acting in pursuance of statutory powers. The action was in nuisance for causing structural damage to the plaintiffs' house by vibrations set up during the building by the defendants of an electric power house; and it was said that if these building operations were stopped by injunction the whole of the City of London would suffer by losing the benefit of the light to be supplied when the building was finished. But the Court of Appeal allowed an injunction against the defendants, and refused the alternative of damages.

(*l*) *Pride of Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1953] 1 All E. R. 179, 197; [1953] Ch. 149, 181; *per* Sir Raymond EVERSHED, M.R.

(*m*) See *Imperial Gas Light and Coke Co.* v. *Broadbent* (1859), 7 H. L. Cas. 600, 612; *per* Lord KINGSDOWN, and Illustration 138. But the equities will be taken into account; though it is a general rule that an injunction will be granted for the infringement of a proprietary right it will be refused if the plaintiff has behaved unconscionably, as by misleading the defendant: *Armstrong* v. *Sheppard and Short*, [1959] 2 All E. R. 651; [1959] 2 Q. B. 384.

(*n*) Including cases of personal libels: see *Bonnard* v. *Perryman*, [1891] 2 Ch. 269, 283; *per* Lord COLERIDGE, C.J.; *Monson* v. *Madame Tussauds, Ltd.*, [1894] 1 Q. B. 671. And even oral slanders: *Hermann Loog* v. *Bean* (1884), 26 Ch. D. 306. But the courts will not lightly grant an *interlocutory* injunction in cases of defamation: see *William Coulson & Sons* v. *James Coulson & Co.* (1887), 3 T. L. R. 846; *per* Lord ESHER, M.R.; *Collard* v. *Marshall*, [1892] 1 Ch. 571, 578; *per* CHITTY, J. Before the Judicature Acts injunctions were not granted in the case of personal libels; see, *e.g. Prudential Assurance Co.* v. *Knott* (1875), 10 Ch. App. 142.

(*o*) This is recognised by Sir R. EVERSHED, M.R., in the passage above cited (*supra*, note (*l*)) as one of the "special circumstances" that may exist.

(*p*) See *A.-G.* v. *London and North-Western Rail. Co.*, [1900] 1 Q. B. 78, and the *Pride of Derbyshire Case* (*supra*, note (*l*)).

(*q*) [1895] 1 Ch. 287.

Where a tort has actually been committed, and its repetition appears to be likely, usually *damages* are awarded for the wrong already done, even though they may be merely nominal—for instance where the tort consists in walking over the plaintiff's land in assertion of an alleged right of way—and an *injunction* is granted against its repetition. But in proper cases the plaintiff may bring an action, known as a "*quia timet*" action, to restrain the commission of a tort which has not at the time actually been committed but is merely threatened; as for instance to restrain the erection of a building (*r*) which when erected will obstruct ancient lights. In such a case, of course, there is no ground for an award of damages, for the plaintiff has suffered, as yet, no injury; but an injunction may be granted to put to rest the plaintiff's fear ("*quia timet*") that his rights are about to be infringed. The onus which lies upon the plaintiff in such cases is, however, a heavy one.

To entitle a plaintiff to the grant of an *interlocutory* injunction the court must be "satisfied that there will be a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiff is entitled to relief" (*s*). Further, at the hearing of the proceedings upon the interlocutory injunction the court must also be satisfied that, unless the required injunction is granted it will become very difficult, or impossible, to do complete justice at a later stage (*t*). Moreover, the remedy being discretionary, the court will take into account the effect upon both parties of granting such interim relief: for instance if the effect of allowing the injunction will be to prevent obvious and considerable loss to the plaintiff at small cost to the defendant, the court will be the more readily disposed to make the order (*u*).

It must now again be mentioned that, by virtue of the powers originally conferred by Lord Cairns' Act, the courts may grant damages *in lieu* of an injunction. This power exists whether the tort in question is only threatened ("*quia timet*") or is actually being committed. The object of conferring it was to enable the court, in proper cases, as it were to license the defendant's wrongdoing in return for payment by him of suitable compensation to the plaintiff. But such a power is necessarily exercised sparingly and

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(*r*) See Illustration 139.

(*s*) *Preston* v. *Luck* (1884), 27 Ch. D. 497, 506; *per* COTTON, L.J. And see *Thompson* v. *Park*, [1944] 2 All E. R. 477; [1944] K. B. 408; *Hivac* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 2 All E. R. 350; [1946] Ch. 169.

(*t*) *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1885), 15 Q. B. D. 476.

(*u*) See *J. T. Stratford & Son, Ltd.* v. *Lindley*, [1964] 3 All E. R. 102; [1965] A. C. 269.

upon equitable principles (*a*), for "the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict" (*b*), and it has been laid down as a "good working rule" that damages may only be awarded in lieu of an injunction:—

"(1) If the injury to the plaintiff's legal rights is small,
(2) *and* is one which is capable of being estimated in money,
(3) *and* is one which can be adequately compensated by a small money payment,
(4) *and* the case is one in which it would be oppressive to the defendant to grant an injunction" (*c*).

This rule was applied by STABLE, J., in *Maberley* v. *Peabody & Co. of London, Ltd.* (*d*), where the defendants had piled up a mound of earth in which there was a deleterious chemical substance, against the plaintiff's wall. In refusing to grant damages instead of an injunction the learned judge pointed out that none of the four conditions were satisfied. Though very little damage had occurred at the date of the action, it was impossible to estimate how great the damage might ultimately be; and it might be large. A small money payment could not therefore be adequate compensation. Moreover, since the plaintiff had from the start protested against the defendants' operations, the grant of an injunction could not be considered oppressive. And, indeed, in *Morris* v. *Redland Bricks, Ltd.* (*e*) the majority of the Court of Appeal did not regard it as oppressive that in granting a mandatory injunction enjoining the defendants to restore support for the plaintiffs' land worth £12,000 the defendants would be forced to spend some £35,000.

But it should finally be noted that the court will sometimes *suspend* the operation of an injunction; especially where the grant of it would seriously affect the defendant while conferring little benefit upon the plaintiff. This may often be necessary in order to satisfy the principle that an injunction must not enjoin the defendant to perform the impossible (*f*); for he may require time to make

(*a*) Thus the conduct of the defendant may be taken into account: see *Sefton (Earl)* v. *Tophams, Ltd. and Capital and Counties Property Co., Ltd.*, [1964] 3 All E. R. 876.

(*b*) *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 315–16; *per* LINDLEY, L.J.

(*c*) *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, 322–3; *per* A. L. SMITH, L.J. (italics ours).

(*d*) [1946] 2 All E. R. 192. See also *Kelsen* v. *Imperial Tobacco Co. (of Great Britain and Ireland), Ltd.*, [1957] 2 All E. R. 343; [1957] 2 Q. B. 334.

(*e*) [1967] 3 All E. R. 1.

(*f*) For this reason the injunction in *Maberley's Case* (above, n. (*d*)) was in fact suspended and the plaintiff, for the time being, granted only a declaration of his rights.

adjustments to meet the new situation that will prevail when the injunction does come into force (*g*).

ILLUSTRATION 138

If a plaintiff has established a legal right, unless there be some special reason to the contrary, he is entitled to an injunction to prevent the violation of that right.

Imperial Gas Light and Coke Co. *v.* Broadbent (1859), 7 H. L. Cas. 600 (*h*).

Respondent complained that appellants had made a retort house for the manufacture of gas close to his house and garden, and that this retort house emitted gases which were injurious to his flowers, fruit and vegetables. He brought an action at law, which was referred to an arbitrator who found in his favour and awarded him damages. Subsequently respondent complained that the nuisance had continued, and that appellants had erected a larger retort house which had caused even greater nuisance. Appellants contended, without offering proof, that the nuisance had in fact diminished and demanded that this issue be tried by a Common Law Court before an injunction could be granted. *Held:* That the finding of the arbitrator established a legal right in respondent just as much as the verdict of a jury would have done. That a right having thus been established, and appellants having given no proof of the abatement of the nuisance, respondent was entitled to an injunction.

ILLUSTRATION 139

Under the powers originally conferred by Lord Cairns' Act, 1858 (*i*), *damages may be awarded either in addition to, or in substitution for, an injunction. And it is no bar to the grant of damages in lieu of an injunction that the action is a "quia timet" action; i.e. that the injury is threatened, but has not yet actually been sustained.*

Leeds Industrial Co-operative Society, Ltd. *v.* Slack, [1924] A. C. 851.

Respondent sought an injunction to prevent appellants from building so as to obstruct his ancient lights. At the time of respondent's petition no obstruction had as yet taken place, but it was clear that it would if the building were permitted to continue. *Held:* The court has power to grant damages in lieu of an injunction even where injury is only threatened. That since in the instant case the threatened injury was small and capable of being adequately compensated by a money payment (*k*), damages should be awarded and an injunction refused.

(*g*) See *Stollmeyer* v. *Trinidad Lake Petroleum Co.*, [1918] A. C. 485; *Pride of Derbyshire Angling Association, Ltd.*, [1953] 1 All E. R. 179; [1953] Ch. 149.

(*h*) See also *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. 179; *Andrews* v. *Waite*, [1907] 2 Ch. 500.

(*i*) 18 Halsbury's Statutes (2nd Edn.) 456.

(*k*) For this requirement, see text of this Chapter.

CHAPTER 4

STATUTORY LIABILITY FOR CAUSING DEATH

1. THE DEATH OF A HUMAN BEING CANNOT BE COMPLAINED OF AS AN INJURY

It has been noted (*a*) that the common law rule was *"actio personalis moritur cum persona"*; causes of action in tort were generally destroyed by the death of either party. And it has been seen that this unhappy state of affairs has now been remedied by legislation (*b*).

But the common law also had another rule which must now be considered and this was that

> "In a civil court the death of a human being could not be complained of as an injury" (*c*).

This is of course quite different from the former maxim; for it means that though a claim might arise in respect of the wrongful causing of the death of a horse or a pet monkey, the common law countenanced no *civil* claim (whatever might be the criminal position with regard for example to murder or manslaughter), for loss caused by the death of a *person*. Thus if C by some wrongful act—such as negligence—were to cause the death of B, and A were to suffer loss thereby, A would have no remedy. This might of course be peculiarly hard upon A, for if for instance A were the wife of B, she might become destitute by the death of her husband and "breadwinner".

The Law Reform (Miscellaneous Provisions) Act, 1934, was *not* directed to the hardship caused by this rule; for it was concerned with the survival after death of rights vested in the *deceased himself*,

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(*a*) Part I, Chapter 5.

(*b*) Law Reform (Miscellaneous Provisions) Act, 1934 (9 Halsbury's Statutes (2nd Edn.) 792). For the relationship of claims under the Act to claims under the Fatal Accidents Acts, see Part I, Chapter 5.

(*c*) *Baker* v. *Bolton* (1808), 1 Camp. 493; *per* Lord ELLENBOROUGH.

or tortious obligations which he had incurred before death, and was concerned to make his estate represent him when dead in respect of these rights and obligations. That Act was not directly designed to compensate those who might lose by his death.

This rule, that "the death of a human being cannot be complained of as an injury", is still part of the law (*d*); so that for example an employer cannot even now bring an action for the loss of services he suffers if his employee is instantly (*e*) killed by the negligence of another person.

But by the operation of the Fatal Accidents Acts, 1846 to 1959 (*f*), very important *exceptions* to the rule are created.

2. THE FATAL ACCIDENTS ACTS, 1846 TO 1959

The nature of this legislation—which can only be comprehended as a whole—must be clearly understood. First, it makes exceptions to the rule, it does not abolish it. It is designed to benefit only certain classes of persons within the family group who may suffer by the death, but it is not intended (*g*) to put a kind of *wergild* or price upon the head of the deceased to afford a *solatium* to his bereaved relations. It is aimed to compensate these relatives for economic loss they may suffer from the death. The principal Act

> "is 'an Act for compensating the families of persons killed', not for solacing their wounded feelings" (*h*).

This Act is the Fatal Accidents Act, 1846 (Lord Campbell's Act). Section 1 provides, in effect, that where death is caused by some wrongful (*i*) act and, had the person killed in fact survived *he would have had a cause of action against the wrongdoer*, the wrongdoer shall (even though the death was caused in circumstances amounting to a felony) be liable to an action for the benefit of the deceased's dependants (*k*).

(*d*) See *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88; *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A. C. 38.

(*e*) As to the employer's rights where the servant is merely injured, see Part II, Chapter 16.

(*f*) 2 Halsbury's Statutes (2nd Edn.) 66.

(*g*) At least as it has been judicially interpreted: see *Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93.

(*h*) *Blake's Case* (last note), at p. 109; *per* COLERIDGE, J. And see *Pym* v. *Great Northern Rail. Co.* (1862), 2 B. & S. 759.

(*i*) As well as a tort this may include a negligent breach of contract: *Grein* v. *Imperial Airways, Ltd.*, [1936] 2 All E. R. 1258; [1937] 1 K. B. 50.

(*k*) For the meaning of "dependants" see p. 432.

Claims under these Acts must be brought within *three years* (*l*) *of the death* of the deceased. And the right to sue is primarily (*m*) vested in his *personal representatives* (*n*).

Certain salient points about this legislation must be stressed.

(i) *There must be a wrong to the deceased.*—It is essential to a successful claim under the Acts that the wrong shall be

> ". . . such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof" (*o*).

A claim can therefore only be brought under the Acts if the deceased person could, if he had lived, have himself sued the defendant (or if the defendant is dead, his estate). Thus where the alleged wrongful act consists of negligence the circumstances must have been such that the defendant owed the deceased a duty of care; for if there was no such duty there could be no wrong (*p*). Similarly, if the deceased's cause of action is statute-barred (*q*) at the time of his death (*r*) claims under the Acts must fail, for there is no longer any wrong upon which to found them. And the same

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(*l*) Fatal Accidents Act, 1846, s. 3 (17 Halsbury's Statutes (2nd Edn.) 7), as amended by Law Reform (Limitation of Actions, etc.) Act, 1954, s. 3 (34 Halsbury's Statutes (2nd Edn.) 463). But see also the Limitation Act, 1963, s. 3 (2)—below, p. 443.

(*m*) Though if no personal representative is appointed or if, having been appointed, he fails to bring an action within six months of the death, the persons entitled to benefit may themselves sue; Fatal Accidents Act, 1864, s. 1 (17 Halsbury's Statutes (2nd Edn.) 9). And see *Stebbings* v. *Holst & Co., Ltd.*, [1953] 1 All E. R. 925; *Finnegan* v. *Cementation Co., Ltd.*, [1953] 1 All E. R. 1130; [1953] 1 Q. B. 688; *Bowler* v. *John Mowlem & Co., Ltd.*, [1954] 3 All E. R. 556. Further, by s. 4 of the 1846 Act the plaintiff must deliver to the defendant full particulars "of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered": see *Cooper* v. *Williams*, [1963] 2 All E. R. 282; [1963] 2 Q. B. 567.

(*n*) Fatal Accidents Act, 1846, s. 2. But the fact that the claim is on behalf of the dependants may be important: see *Jeffrey* v. *Kent County Council*, [1958] 3 All E. R. 155.

(*o*) *Ibid.*, s. 1.

(*p*) *Mersey Docks and Harbour Board* v. *Procter*, [1923] A. C. 253. The effect of *contributory negligence* on the part of the deceased is now to reduce proportionately the damages recoverable under the Acts: Law Reform (Contributory Negligence) Act, 1945, s. 1 (4) (17 Halsbury's Statutes (2nd Edn.) 12).

(*q*) *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804.

(*r*) As to the position where the action is brought *within* the limitation period prescribed by the Acts, but at a time when (though it was *not* statute-barred at the time of death), had the deceased still been *alive* it would have been barred as against *him*, and see *British Columbia Electric Rail. Co., Ltd.* v. *Gentile*, [1914] A. C. 1034; *Venn* v. *Tedesco*, [1926] 2 K. B. 227. Contrast *Appelbe* v. *West Cork Board of Health*, [1929] I. R. 107.

applies if the deceased had while alive accepted satisfaction for his injuries (*s*), or had agreed not to sue (*t*).

(ii) *The people for whose benefit the action lies.*—These are, as has been seen, a limited class of *dependants*. These include the wife, husband, children (*u*) and grandchildren (*a*) of the deceased: also his or her brother, sister, uncle or aunt and their issue (*b*). Adopted children are treated as (and only as) the children of the adopter (*c*). And all these relationships are determined by affinity as well as by consanguinity (so that, *e.g.* a brother-in-law is treated as a brother), any relationship of the half-blood as a relationship of the whole blood (a half-brother therefore counts as a brother), and step-children are treated as children (*d*). Illegitimate children are treated as the children of the deceased mother or of the deceased reputed father as the case may be (*e*).

The damages are apportioned as the court or jury think proper among these dependants.

(iii) *The basis of compensation.*—The right of the dependants is, as been noted, not to a *solatium* for grief and injured feelings, but to damages for a *pecuniary loss* actual or prospective.

> "The claim is a *new* right given by Lord Campbell's Act on new principles, *not the transfer of any existing right* of the dead man. The claimant is entitled to damages proportioned to the injury resulting to her from the death, and that injury *must be pecuniary injury*. She is *not* entitled to money compensation for mental suffering resulting from the death or for loss of the deceased's society" (*g*).

The assessment and apportionment of this pecuniary loss is a difficult matter, and much must depend upon the facts and circum-

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(*s*) *Read* v. *Great Eastern Rail. Co.* (1868), L. R. 3 Q. B. 555.

(*t*) *Griffiths* v. *Earl of Dudley* (1882), 9 Q. B. D. 357: such an agreement may be implied as well as express; *Haigh* v. *Royal Mail Steam Packet Co., Ltd.* (1883), 52 L. J. Q. B. 640; *The Stella*, [1900] P. 161. But an agreement by the deceased merely to *limit damages* in the case of injury does not affect the rights of dependants: *Nunan* v. *Southern Rail. Co.*, [1924] 1 K. B. 223, 229; *per* ATKIN, L.J.: *Grein* v. *Imperial Airways, Ltd.*, [1936] 2 All E. R. 1258; [1937] 1 K. B. 50.

(*u*) Fatal Accidents Act, 1846, s. 2 (17 Halsbury's Statutes (2nd Edn.) 5).

(*a*) *Ibid.*, s. 5 (as amended by the Fatal Accidents Act, 1959, Schedule).

(*b*) Fatal Accidents Act, 1959, s. 1 (1) (39 Halsbury's Statutes (2nd Edn.) 941).

(*c*) *Ibid.*, s. 2 (1).

(*d*) *Ibid.*, s. 2 (1) (b).

(*e*) *Ibid.*, s. 2 (1) (c). A child *en ventre sa mere* is treated as a "child" for this purpose, and when born damages may be awarded on its behalf: *The George and Richard* (1871), L. R. 3 A. & E. 466.

(*g*) *Baker* v. *Dalgleish Steam Shipping Co., Ltd.*, [1922] 1 K. B. 361, 371; *per* SCRUTTON, L.J. (italics ours).

stances of each particular case; for, as WILLMER, L.J., said in *Daniels* v. *Jones* (*h*), "In what is essentially a jury question the overall picture is what matters. It is the wood that has to be looked at, and not the individual trees". But guidance is to be gained from the authorities on various points.

In order to substantiate a claim in favour of a dependant a *pecuniary loss resulting from the death* must be established. Where this cannot be done there will be no ground for compensation.

> ". . . Where a man has no means of his own and earns nothing, his wife and children cannot be pecuniary losers by his decease. In the like manner when by his death the whole estate from which he derived his income passes to his widow or to his child (as was the case in *Pym* v. *Great Northern Rail. Co.* (*i*)) no statutory claim will lie at their instance" (*k*).

And this loss must be the loss of an economic gain which the dependant could reasonably have expected to acquire by the continued existence of the deceased (*l*); there can be no claim in respect of a merely speculative benefit which *might* have been acquired by such continued existence (*m*). Further, the actual circumstances of the dependant at the time of action have to be taken into account; thus the remarriage of a dependant widow may be an important consideration in reduction of damages (*n*). And, difficult though it be, the court must also take account of a widow's *prospects* of remarriage (*o*).

Further, the loss must be one which not only arises by reason of the death but also results from the relationship of the parties. Thus in *Sykes* v. *North Eastern Rail. Co.* (*p*) a father was held not entitled to claim under the Acts in respect of the death of his son whom he had employed as a skilled workman at a reasonable market wage, and who did not contribute to the father's support. Here the loss

(*h*) *Daniels* v. *Jones*, [1961] 3 All E. R. 24, 30. And see *Kassam* v. *Kampala Aerated Water Co., Ltd.*, [1965] 2 All E. R. 875; *Whittome* v. *Coates*, [1965] 3 All E. R. 268.

(*i*) (1862), 2 B. & S. 759.

(*k*) *Grand Trunk Rail. Co. of Canada* v. *Jennings* (1888), 13 App. Cas. 800, 804; *per* Lord WATSON.

(*l*) *Taff Vale Rail. Co.* v. *Jenkins*, [1913] A. C. 1 (Illustration 140 (a)).

(*m*) *Barnett* v. *Cohen*, [1921] 2 K. B. 461 (Illustration 140 (b)).

(*n*) See *Curwen* v. *James*, [1963] 2 All E. R. 619.

(*o*) *Goodburn* v. *Thomas Cotton, Ltd.*, [1968] 1 All E. R. 518; [1968] 1 Q. B. 845. Disapproving a *dictum* to the contrary in *Buckley* v. *John Allen & Ford (Oxford), Ltd.*, [1967] 1 All E. R. 539; [1967] 2 Q. B. 637.

(*p*) (1875), 44 L. J. C. P. 191. And see the interpretation of this case in *Burgess* v. *Florence Nightingale Hospital for Gentlewomen*, [1955] 1 All E. R. 511; [1955] 1 Q. B. 349, with which contrast *Behrens* v. *Bertram Mills Circus*, [1957] 1 All E. R. 583; [1957] 2 Q. B. 1: *Malyon* v. *Plummer*, [1963] 2 All E. R. 344; [1964] 1 Q. B. 330.

was simply the loss of a servant, not of a son; though it would have been otherwise if the son had contributed to the father's support and it would probably have been otherwise, too, if out of natural love and affection the son had worked for a nominal wage only (*q*).

Formerly funeral expenses were not recoverable under the Acts, but now they may be recovered if they have actually been discharged by the dependants and have not been paid out of the estate (*r*).

Since *pecuniary loss* is the basis of the claim any counterbalancing gain to the dependants which results from the death must usually be taken into account *in reduction of damages*. But this topic merits a separate paragraph.

(iv) *Counterbalancing gain.*—Sometimes the death of a man results in a gain to his dependants; as where his widow or orphan becomes entitled to a pension. This formerly gave rise to difficulty, for it was thought that the benefit automatically ensuing upon the death ought to be taken into account in reduction of damages, at least in some circumstances (*s*); but by the Act of 1959 it is provided that

> "In assessing damages under the Fatal Accidents Act, 1846 . . . there shall not be taken into account any insurance money, benefit, pension or gratuity which has been or will or may be paid as a result of the death (*t*)."

Further, in order to count against a claim a gain which dependants receive must arise as the result of the death. So in *Peacock* v. *Amusement Equipment Co., Ltd.* (*u*), the voluntary payment by children of money received by them under their mother's will to

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(*q*) And where spouses work in partnership the survivor may claim in respect of increased out-of-pocket expenses caused by the death of one: *Burgess' Case* (last note). See also *Berry* v. *Humm & Co.*, [1915] 1 K. B. 627 (loss of domestic services of wife).

(*r*) Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (3) (17 Halsbury's Statutes (2nd Edn.) 11). And see *Hart* v. *Griffiths-Jones*, [1948] 2 All E. R. 729 (£225 for monument unreasonable and excessive; but cost of embalming body recovered) and *Stanton* v. *Ewart F. Youldon, Ltd.*, [1961] 1 All E. R. 429.

(*s*) Both case law and statute, however, gave some relief in respect of the harsh rule that such benefits had to be deducted. See, *e.g. Baker* v. *Dalgleish Steam Shipping Co., Ltd.*, [1922] 1 K. B. 361; *Johnson* v. *Hill*, [1945] 2 All E. R. 272 and the Fatal Accidents (Damages) Act, 1908 (repealed by the 1959 Act, Schedule).

(*t*) Fatal Accidents Act, 1959, s. 2 (2) enacts that "*benefit*" means benefit under the National Insurance Acts; "*insurance money*" includes a return of premiums; "*pension*" includes a return of contributions and any payment of a lump sum in respect of a person's employment.

(*u*) [1954] 2 All E. R. 689; [1954] 2 Q. B. 347. And see *Moore* v. *Babcock & Wilcox, Ltd.*, [1966] 3 All E. R. 882. Contrast *Mead* v. *Clarke Chapman & Co., Ltd.*, [1956] 1 All E. R. 44; *Jenner* v. *Allen West & Co., Ltd.*, [1959] 2 All E. R. 115.

their widower father was held not to be accountable against his claim under the Acts in respect of the mother's death; for the payment resulted not from the death, but from the children's generosity.

ILLUSTRATION 140

(a) *In order to maintain a claim under the Fatal Accidents Acts it is not necessary that the deceased should, at the time of death, have been actually contributing to the support of the plaintiff provided that the latter had a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased.*

Taff Vale Rail. Co. *v.* Jenkins, [1913] A. C. 1.

The action was brought on behalf of the parents of a girl aged sixteen years who had been killed in a railway accident. At the time of her death the girl had been an *apprentice* dressmaker; and she was, of course, learning not earning. There was evidence that the girl was intelligent and, had she lived, that she would shortly have earned substantially and would in all probability have contributed to the keep of the parents. *Held:* That there was sufficient evidence of pecuniary loss to the parents to support their claim. "Loss may be *prospective*, and it is quite clear that prospective loss may be taken into account" (*a*).

(b) *But there must be a reasonable expectation of pecuniary benefit not a mere speculative possibility.*

Barnett *v.* Cohen, [1921] 2 K. B. 461.

The claim was brought by a father in respect of the death of his small boy, aged four years, who was killed by defendants' negligence. The father had intended to give the child a good education and had hoped that some day (though he was himself in a substantial way of business) the child would contribute to his support. *Held:* The claim failed. The child "might or might not have turned out a useful young man. . . . I cannot speculate one way or the other. . . . The whole matter is beset with doubts, contingencies and uncertainties" (*b*).

It must be added that the Carriage by Air Act, 1961 (*c*), applies the provisions of the Fatal Accidents Acts (*d*) to cases in which death occurs on board an aircraft or in the process of embarkation or disembarkation therefrom (*e*). Claims in such cases are subject

(*a*) [1913] A. C. 1, at p. 4; *per* Viscount HALDANE, L.C. (italics ours).
(*b*) [1921] 2 K. B. at p. 472; *per* McCARDIE, J. Contrast *Wolfe* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L. R. Ir. 548—though this decision probably goes to the limit of the law.
(*c*) See also the Carriage by Air (Supplementary Provisions) Act, 1962.
(*d*) Carriage by Air Act, 1961, s. 3. Though damages under the Act appear not to be limited to financial loss: *Preston* v. *Hunting Air Transport, Ltd.*, [1956] 1 All E. R. 443; [1956] 1 Q. B. 454.
(*e*) *Ibid.*, Schedule I, art. 17.

to the provisions of the Warsaw Convention, 1929, as amended at the Hague in 1955, and these provisions are incorporated as part of the law of England (*f*). The Convention is not thought to be of sufficient general importance to merit extensive examination here, and if need should arise it must be consulted in detail (*g*). The following features must, however, be noted. The Convention applies to claims for personal injuries as well as to claims in respect of death (*h*); generally speaking the maximum amount recoverable is the equivalent of 250,000 francs (*i*), a special period of limitation applies to such claims (*k*).

(*f*) *Ibid.*, s. 1 (1).

(*g*) The Convention is appended as Schedule I to the Act. It now applies to non-international as well as to international carriage: Carriage by Air Acts (Application of Provision) Order, 1967. (S.I. 1967 No. 480.)

(*h*) Schedule I, art. 17.

(*i*) *Ibid.*, art. 20 (1).

(*k*) See next Chapter.

CHAPTER 5

WAIVER OF TORT

This doctrine is impossible to understand without reference to history, but it is probably still of sufficient practical importance to require mention.

Briefly, at common law, before the abolition of the forms of action, there were in some cases certain advantages in suing in what we now call quasi-contract rather than in tort. Some acts which amounted to torts, such as conversion of goods, selling them and keeping the proceeds, could also be treated (by use of procedural fictions) as giving rise to a claim in *assumpsit* (in its quasi-contractual form of an action for money had and received). Hence the courts, from about the latter part of the seventeenth century (*a*), allowed plaintiffs to "waive the tort", as it was called, and sue in *assumpsit* instead of, say (*b*), *trover* or *detinue*. And in substance this was logical as well as just, for there is no reason why if a man converts my picture and then sells it I should not claim the proceeds of the sale as my own, as opposed to suing him for damages.

Under the old law, before the great procedural reforms ultimately completed by the Judicature Acts, 1873–5, such "waiver" of the tort might in a real sense have been held to constitute an irreparable *election*; for, in those days, "*ubi remedium ibi jus*", and one form of action and one only had to be selected. It was therefore arguable that once a plaintiff had embarked upon his action in the one form—whether against one defendant only or against two defendants combining to cause the same damage (*c*)—he could not go back upon his election if he failed to obtain satisfaction by that means, and sue afresh or start an action against a second defendant in *tort*

(*a*) For the history see Winfield, *Province of the Law of Tort*, and Jackson, *History of quasi-contract in English Law*.

(*b*) What torts could, or can, be waived is uncertain. Winfield, *Province of the Law of Tort*, p. 169, includes conversion, trespass to land or goods, deceit and occasionally "case". See *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E. R. 20, 25–26; [1941] A. C. 1, 12–13, and *Rodgers* v. *Maw* (1846), 15 M. & W. 444, 448.

(*c*) *E.g.* B steals A's goods, sells to C, and C to D. See Lord ATKIN's example in the *United Australia Case*, [1940] 4 All E. R. 20, 37; [1941] A. C. 1, 31.

if he had once embarked upon the litigation in *assumpsit*. And this argument had some support (*d*).

But since the abolition of the forms of action such reasoning has lost any force it ever had because *alternative* claims may now be made upon the same facts, and claims in contract and tort or in quasi-contract and tort may now be pursued together, and pleadings may be amended to include new claims in law during the course of a trial. Consequently the House of Lords in *United Australia, Ltd.* v. *Barclays Bank, Ltd.* (*e*), ruled that (i) where an action is brought against *one* defendant nothing short of *judgment* (*f*) will debar the plaintiff from establishing his case either way, either as a tort or as quasi-contractual liability; (ii) where an action is brought against two or more defendants who combine to cause the same damage nothing short of *satisfaction* (*g*) of the plaintiff by one or more of the defendants will debar him from proceeding against the other or others in tort, quasi-contract or both in the alternative (*h*).

This decision was not concerned with *joint tortfeasors*, but in view of the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, as to joint tortfeasors, which have already been considered, there seems little reason to doubt that, since judgment against one is now no longer a bar to judgment against all, joint tortfeasors will now receive similar treatment in this respect to tortfeasors who combine independently to cause the same damage.

ILLUSTRATION 141

Where a plaintiff has a claim against two or more defendants in respect of injury independently caused, but arising out of the same facts, and he has alternative remedies in tort or for money had and received, it is no bar to a claim in tort against one of the defendants that he has already taken proceedings (without satisfaction) in an action for money had and received against another.

(*d*) *Smith* v. *Baker* (1873), L. R. 8 C. P. 350, 355; *per* BOVILL, C.J.

(*e*) [1940] 4 All E. R. 20; [1941] A. C. 1 (Illustration 141).

(*f*) [1940] 4 All E. R. pp. 29, 38, 40; [1941] A. C. pp. 17, 30, 34.

(*g*) *Ibid.*, pp. 31, 38, 53; 21, 31, 54 respectively, and see *Rice* v. *Reed*, [1900] 1 Q. B. 54. It need hardly be mentioned that the difference between instances (i) and (ii) is that where there is *one* defendant judgment against *him* is the best guarantee of satisfaction the plaintiff *can* get. It should also be added that though there may be an alternative *claim* when it comes to judgment the plaintiff must finally elect between judgment upon one basis or the other.

(*h*) Whether a plaintiff who proceeds to judgment in tort or in quasi-contract due to lack of knowledge of facts which might give him a claim under the alternative head is debarred from pursuing the alternative claim when the facts become known to him is an open question: see, [1940] 4 All E. R. pp. 30 and 53; [1941] A. C. pp. 20 and 54. Here again the position may perhaps differ according to whether one or more defendants are involved.

United Australia, Ltd. *v.* Barclays Bank, Ltd., [1940] 4 All E. R. 20; [1941] A. C. 1.

Appellant company's secretary wrongfully endorsed a cheque payable to them to the X Co. who paid it into their (the respondent) bank. Appellants having sued X Co. for money had and received and these proceedings having come to no conclusion, appellants then sued respondents in conversion. *Held:* Though appellants had effected a technical "waiver of tort" in suing X Co. for money had and received, this was no bar to their bringing the second action in conversion against respondents. Before *judgment* against them, appellants would even have been entitled to add their claim in tort had the action been solely against X Co.; until *satisfaction* by X Co. they were entitled to pursue their claim either in tort or in quasi-contract (or both in the alternative) against respondents.

CHAPTER 6

LIMITATION OF ACTIONS

THE PERIODS OF LIMITATION

The Ordinary Period

The general rule is that, by virtue of the Limitation Act, 1939 (*a*), "actions founded on tort shall not be brought after the expiration of *six* years from the date on which the cause of action accrued" (*b*). But this rule has, by the provisions of the Law Reform (Limitation of Actions, etc.) Act, 1954 (*c*), now been subjected to a very important exception, for

> "in the case of actions for damages for *negligence, nuisance* or *breach of duty* (whether the duty exists by virtue of a contract or of provision made by or *under a statute* or *independently of any contract or any such provision*) where the damages claimed . . . consist of or include damages in respect of *personal* injuries. . . . (*d*)"

the period is *three* years, instead of six.

(*a*) Section 2 (1) (a) (13 Halsbury's Statutes (2nd Edn.) 1159). In general the Act binds the Crown: s. 30. A certain degree of laxity in amending pleadings is allowed so as to bring the case within the limitation period: see *Dornan* v. *J. W. Ellis & Co., Ltd.*, [1962] 1 All E. R. 303; [1962] 1 Q. B. 583: *Collins* v. *Hertfordshire County Council*, [1947] 1 All E. R. 633; [1947] K. B. 598 (plaintiff's amendment no new cause of action disclosed). But this cannot be done where though no new case of action is disclosed a new case is sought to be made out: *Batting* v. *London Passenger Transport Board*, [1941] 1 All E. R. 228. See also *Weait* v. *Jayanbee Joinery, Ltd.*, [1962] 2 All E. R. 568; [1963] 1 Q. B. 239; *Turner* v. *Ford Motor Co., Ltd.*, [1965] 2 All E. R. 583.

(*b*) Limitation in respect of actions for recovery of land has already been considered (above, pp. 93–96). As to the meaning of "founded on tort" see above, pp. 10–12.

(*c*) Section 2 (1) (34 Halsbury's Statutes (2nd Edn.) 463), amending the Limitation Act, 1939, s. 2 (1) (Italics ours). The Act binds the Crown: s. 5 (1). But s. 5 (3) imposes a *one* year period in the case of actions in respect of lost or damaged postal packets.

(*d*) Actions for trespass to the person come within this enactment for they involve a "breach of duty"; *Letang* v. *Cooper*, [1964] 2 All E. R. 929; [1965] 1 Q. B. 232. And this is so whether the trespass is intentional or unintentional: *Long* v. *Hepworth*, [1968] 3 All E. R. 248.

Special Periods

The most important of these have already been considered; that is to say the *twelve* year period in respect of actions for the recovery of land, the *three* year period under the Fatal Accidents Acts, and the *six month* period after representation has been taken out under the Law Reform (Miscellaneous Provisions) Act, 1934.

It must also be added that by the Limitation Act, 1963 (*e*), the right of one joint tortfeasor to recover contribution against another is now statute barred after the end of *two* years from the date on which the right accrued (*f*) to him; that by the Maritime Conventions Act, 1911 (*g*), a *two* year period is imposed in the case of actions for damages by collisions at sea (*h*): and that a *two*-year period also applies in the case of claims under the carriage by Air Act, 1961 (*i*).

THE COMMENCEMENT OF LIMITATION

Time begins to run from *the date on which the cause of action accrues* (*k*). This means that in the case of torts which are actionable *per se*, without proof of actual damage (such as trespass), the relevant date is the date on which the wrong was done (*l*); but in the case of torts (such as negligence) only actionable upon proof of damage, time runs from the moment the damage is occasioned—which may of course be a considerable time after the breach of duty which causes it (*m*). But once the damage *is* caused time begins to run. In the

(*e*) Section 4 (1).

(*f*) See below.

(*g*) Section 8 (23 Halsbury's Statutes (2nd Edn.) 834). See *The Alnwick*, [1965] 2 All E. R. 569; [1965] P. 357.

(*h*) This now binds the Crown: Law Reform (Limitation of Actions, etc.) Act, 1954, s. 5 (2) (34 Halsbury's Statutes (2nd Edn.) 463), modifying the Crown Proceedings Act 1947, s. 30 (1). The Nuclear Installation (Licensing and Insurance) Act, 1959, s. 4 (4) (39 Halsbury's Statutes (2nd Edn.) 1295) provides a *thirty* year period in respect of injury arising from radiation.

(*i*) Carriage by Air Act, 1961, s. 5 (1) and Schedule I, art. 29; and—as to joint tortfeasors within the Act—s. 5 (2) as amended by the Limitation Act, 1963, s. 4 (1), (2), (4). Claims under the Carriage of Goods by Road Act, 1965, are generally subject to a one-year period; see Schedule to that Act, art. 32.

(*k*) Limitation Act, 1939, s. 2 (1).

(*l*) In computing the period the day upon which the wrong is done is itself excluded: *Hardy* v. *Ryle* (1829), 9 B. & C. 603.

(*m*) For instance an ill-designed culvert may constitute a potential nuisance and may cause flooding many years after it is made: *Pemberton* v. *Bright*, [1960] 1 All E. R. 792. But see the remarks of Diplock, L.J. in *Bagot* v. *Stevens Scanlan & Co.*, [1964] 3 All E. R. 577; [1966] 1 Q. B. 197.

other hand, the onus lies on the *defendant* to establish that the claim is time-barred; and the court will not be over-nice in attributing physical damage caused by an admitted breach of duty (*n*) to a time which falls outside the time-limit if some of it clearly does fall within it (*o*).

The position in respect of continuing torts has been considered (*p*); time runs when their commission *ceases*. Of course where a tort is repeated at intervals the time begins in each case from the day on which the tort is repeated, and the right of action will not be barred in respect of a later repetition merely because it is barred in respect of an earlier commission of it.

In conversion and detinue limitation begins to run from the date of the wrongful act, and not before: thus if X keeps a chattel for Y for twenty years and there is no proof that X has converted it during that period, but *then*, on Y's demand, refuses to return it, the cause of action accrues from the date of demand and refusal only (*q*). But it will be otherwise if Y *does* commit a wrongful act of conversion during the period; for then time runs from that moment and not from demand and refusal (*r*). And this rule applies equally where there are successive conversions by different people, as where a car stolen by T is sold successively to A, B and C; then time runs as against the owner *from the time of the theft* (*s*) and no new cause of action arises in respect of each conversion. Hence in such a case even though C only received the car a year

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(*n*) *Aliter* if the damage in question is *not* caused by any breach of duty: *Crookall* v. *Vickers-Armstrong, Ltd.*, [1955] 2 All E. R. 12 (by analogy to *Bonnington Castings, Ltd.* v. *Wardlaw*, [1956] 1 All E. R. 615; [1956] A. C. 613).

(*o*) *Clarkson* v. *Modern Foundries, Ltd.*, [1958] 1 All E. R. 33 (by analogy to *Bonnington Castings, Ltd.* v. *Wardlow*, [1956] 1 All E. R. 615; [1956] A. C. 613).

(*p*) Part III, Chapter 2.

(*q*) *Philpott* v. *Kelley* (1835), 3 Ad. & El. 106.

(*r*) *Granger* v. *George* (1826), 5 B. & C. 149; *Beaumont* v. *Jeffrey*, [1925] Ch. 1; *Betts* v. *Receiver of Metropolitan Police*, [1932] 2 K. B. 595.

(*s*) This is the effect of Limitation Act, 1939, s. 3 (1) (11 Halsbury's Statutes (2nd Edn.) 1159). *Spackman* v. *Foster* (1883), 11 Q. B. D. 99, and *Miller* v. *Dell*, [1891] 1 Q. B. 468, are no longer good law, unless, in the case of the latter title deeds may be thought not to be "chattels" and not to come within the section: see *Plant* v. *Cotterill* (1850), 5 H. & N. 430. On the other hand, *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206—which holds that where a *bailee* converts, as by selling the goods, and the owner later demands them, time runs from demand and refusal—may still be good law since the section refers to the accrual of the original cause of action, and it may be that here there is no "accrual" until the second event. The principle of the case at any rate seems just, for there is no reason why a dishonest bailee should benefit by his own wrong. Salmond, *Law of Torts* (14th Edn.), p. 163, and other writers take a different view: but see *Rosenthal* v. *Alderton & Sons, Ltd.*, [1946] 1 All E. R. 583; [1946] K. B. 374, and *Beaman* v. *A.R.T.S.*, [1948] 2 All E. R. 89, 93 (this case goes on appeal: [1949] 1 All E. R. 465; [1949] 1 K. B. 550).

since, the owner has no claim against him if the *theft* took place more than six years before (*t*). Moreover, it is now provided that the owner's *title* is extinguished if he is wrongfully deprived of his chattel for more than six years (*u*).

As between joint tortfeasors the right of action accrues from the date of judgment or the date of an arbitration award against the tortfeasor seeking contribution (*a*) or, where he has admitted liability, from the date upon which the amount of the liability was agreed with the person or persons claiming against him (*b*).

LACK OF KNOWLEDGE, FRAUD AND DISABILITY

LACK OF KNOWLEDGE

Cartledge v. *E. Jopling & Sons, Ltd.* (*c*) showed that injustice might arise in a case where an injury is inflicted in a way that can only become discoverable after lapse of time—there are of course various kinds of industrial disease, such as in particular pneumoconiosis, which are slow to show themselves. In such cases before the Limitation Act, 1963, a plaintiff could find himself time-barred before he knew of the injury, either because the disease had not developed before the expiry of the limitation period or because, though suffering from it, there was no means of relating the injury to the wrong which gave rise to it.

The 1963 Act (*d*) removes this injustice. It applies to

> "any action for damages for negligence, nuisance or breach of statutory duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) (*e*)".

provided that the damages claimed include a claim in respect of personal injuries. It enacts that in such actions

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(*t*) See *R. B. Policies at Lloyds* v. *Butler*, [1949] 2 All E. R. 226; [1950] 1 K. B. 76, which also decides that the cause of action "accrues" even though nothing is known about the original convertor, the thief.

(*u*) Limitation Act, 1939, s. 3 (2) (13 Halsbury's Statutes (2nd Edn.) 1156).

(*a*) Limitation Act, 1963, s. 4 (2) (a) (43 Halsbury's Statutes (2nd Edn.) 617).

(*b*) *Ibid.*, s. 4 (2) (b).

(*c*) [1963] 1 All E. R. 341; [1963] A. C. 758.

(*d*) Passed as the result of the recommendations of the (Edmund Davies) Committee on Limitation of Actions in Cases of Personal Injury (1962) Cmnd. 1829.

(*e*) Section 1 (2). These are of course the claims included under s. 2 (1) of the Law Reform (Limitation of Actions, etc.) Act, 1954.

. . . "if it is proved that the material facts (*f*) relating to that cause of action were or included facts of a decisive character (*g*) which were at all times *outside the knowledge* (actual or constructive) (*h*) of the plaintiff until a date which—(a) *either* was *after* the end of the three year period (*i*) relating to the cause of action or was not more than *twelve months* before the end of that period, *and* (b) in either case was a date not earlier than *twelve months* before the date on which the action was brought (*k*)"

then, with *leave of the Court* (*l*) the "time limit of three years for bringing the action . . . shall not afford any defence (*m*)."

This appears to be a long-winded (*n*) way of saying that if the plaintiff discovers that he has an injury (which he previously neither knew about nor ought to have discovered) he has *a year* in which to bring his claim even though the three year limit is past. Unless of course he makes the discovery (or ought to have made it) more than a year before the three year limit has run out; then, naturally, he falls within the three year limitation period from the date at which the cause of action "accrued" (*o*). And the same applies in a case where the injury or disease though he knew of it could not be definitely attributed to the defendant's wrong (*p*).

Further, these rules are applied to claims surviving for the benefit of the estates of deceased people under the Law Reform (Miscellaneous Provisions) Act, 1934 (*q*), and to claims under the Fatal Accident Acts (*r*); though in the case of these kinds of claims the rule is that time runs *either* from the time the deceased himself knew or ought

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(*f*) As to the meaning of "material facts" see s. 7 (3) of the Act and *Re Clark* v. *Forbes Stuart (Thames Street), Ltd.*, [1964] 2 All E. R. 282.

(*g*) As to the meaning of "decisive character" see 7 (4): it has been paraphrased as meaning such facts as would support a "worth-while action"; *Goodchild* v. *Greatness Timber Co., Ltd.*, [1968] 2 All E. R. 255.

(*h*) As to "knowledge (actual or constructive)" see 7 (5), (6), (8). See *Pickles* v. *National Coal Board*, [1968] 2 All E. R. 598.

(*i*) *I.e.* the limitation period for personal injuries claims under the Law Reform (Limitation of Actions, etc.) Act, 1954.

(*k*) Section 1 (3). (Italics ours).

(*l*) Section 1 (1) (a). Application is to be *ex parte* (s. 2 (1)) and the grounds for granting leave are laid down in s. 2 (2), (3). In this matter there is no appeal beyond the Court of Appeal (s. 2 (4)). See *Cozens* v. *North Devon Hospital Management Committee*, [1966] 2 All E. R. 799; [1966] 2 Q. B. 330.

(*m*) Section 1 (1), *i.e.* the three year limit under the 1954 Act.

(*n*) It is not an easy enactment to find one's way about in. Indeed the judiciary have, on several occasions, used stronger language about it: see *e.g.* *Kirby* v. *Leather*, [1965] 2 All E. R. 441, 445; [1965] 2 Q. B. 367, 385–6; *per* DANCKWERTS, L.J.

(*o*) See s. 7 (2) and proviso.

(*p*) See s. 7 (3) (c).

(*q*) Limitation Act, 1963, s. 3 (1).

(*r*) *Ibid.*, s. 3 (2).

to have known of the injury *or*, if during his life it could not have been discovered, from the date of his death (*s*).

FRAUD

Where

". . . (a) the action is based upon the *fraud* of the defendant . . ., or (b) the right of action is *concealed by the fraud* of (the defendant) . . ., or (c) the action is for relief from the consequences of a *mistake*, the period of limitation shall not begin to run *until the plaintiff has discovered* the fraud or the mistake . . . or could with reasonable diligence have discovered it" (*t*).

It is obviously just that in these cases the running of time should be thus postponed. It is to be noted that "fraud" in para. (a) means fraud in its technical sense, as in an action for deceit or an action claiming rescission of a transaction brought about by fraud (*u*); but in para. (b) ("concealed by fraud") the word "fraud" has a wider meaning (*a*) and can include, for example, a case where B abstracts A's minerals furtively, but taking no active steps by way of concealment (*b*), and even a case where there is no moral turpitude on the part of the defendant (*c*). The essence of the matter is that the plaintiff's right cannot begin to accrue (and time to run in the defendant's favour) until the plaintiff has a reasonable chance to know of its existence. But it must also be observed that this section only applies where the fraudulent concealment is done *by the person who sets up the statute*, or by someone through whom he claims (*d*), that the rights of a person who purchases property for value and good faith are protected (*e*), and that as soon as the defrauded party becomes aware of the truth time will start to run (*f*).

(*s*) This appears to be the joint effect of ss. 1 and 3. The Limitation Act, 1963, binds the Crown: s. 5 (Though the draftsman might have said so plainly instead of resorting to periphrasis).

(*t*) *Ibid.*, s. 26.

(*u*) See *Beaman* v. *A.R.T.S., Ltd.*, [1949] 1 All E. R. 465, 467; [1949] 1 K. B. 550, 558 (Illustration 142).

(*a*) Similar to "equitable" fraud or fraud within the Real Property Limitation Act, 1833, s. 26. See *Beaman's Case* and cf. *Shaw* v. *Shaw*, [1954] 2 All E. R. 638; [1954] 2 Q. B. 429; *Kitchen* v. *Royal Air Forces Association*, [1958] 2 All E. R. 241; *Clark* v. *Wool*, [1965] 2 All E. R. 353.

(*b*) *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351.

(*c*) See *Beaman's Case* (*supra*, note (*u*)).

(*d*) See *Thorne* v. *Heard and Marsh*, [1894] 1 Ch. 599; [1895] A. C. 495; *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718; *Lynn* v. *Bamber*, [1930] 2 K. B. 72.

(*e*) Limitation Act, 1939, s. 26 proviso (i).

(*f*) *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906), 94 L. T. 756. As to fraud in claims under the Limitation Act, 1963 (which makes allowance for it), see s. 4 (3); as to the position of joint tortfeasors, see s. 7 (2) (b).

ILLUSTRATION 142

The expression "concealed fraud" in the Limitation Act, 1939, s. 26 (b) denotes any act of concealment which makes it difficult for the plaintiff to know of the existence of his rights.

Beaman v. A.R.T.S., Ltd., [1949] 1 All E. R. 465; [1949] 1 K. B. 550.

Plaintiff deposited packages with defendants as bailees for reward in 1935. She went to Turkey and did not return to England until 1946. Defendants, being an Italian firm, were in effect, forced to close their business as warehousemen during the world war and their manager *without attempting to communicate* with plaintiff gave some of the packages away in order to get rid of them and simplify the winding up of the enterprise. This act of conversion took place *more than six years* before plaintiff returned and demanded her property. To defendants' claim that her action was statute barred, plaintiff replied that (i) defendants were guilty of "fraud" within s. 26 (a) of the 1939 Act, alternatively (ii) that they had committed a "concealed fraud" within s. 26 (b). *Held:* There was no fraud in the sense of deceit under s. 26 (a), for there had been no *active* steps at concealment; but there was "concealed fraud" within s. 26 (b). "I am of opinion that the conduct of the defendants, by the very manner in which they converted the plaintiff's chattels in breach of the confidence reposed in them, and *in circumstances calculated to keep her in ignorance of the wrong* that they had committed amounted to a *fraudulent concealment of the cause* of action" (*h*).

DISABILITY

Where at the time that a right of action accrues the person to whom it accrues is under a disability, that is to say is an *infant*, or of *unsound mind*, the statute does not begin to run until the *ceasing of the disability* or the *death* of the person concerned, whichever event happens first (*i*); though the effect of this provision is mitigated by the proviso that the relevant section "shall not apply unless the plaintiff proves that the person under disability was not, at the time when the action accrued to him, in the custody of a parent" (*k*).

But once time has begun to run, *subsequent* disability (as by subsequent unsoundness of mind), does not then operate to postpone the effect of the statute. And this is so whether the subsequent

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(*h*) [1949] 1 All E. R. at p. 470; [1949] 1 K. B. at p. 566; *per* Lord GREENE, M.R. (italics ours). The whole judgment should be read.

(*i*) Limitation Act, 1939, ss. 22 and 31 (2).

(*k*) Limitation Act, 1939, s. 22, as amended by Law Reform (Limitation of Actions, etc.) Act, 1954, s. 2 (2) (b). This piece of legislative imbecility has been sufficiently plumbed by *Kirby* v. *Leather*, [1965] 2 All E. R. 441; [1965] 2 Q. B. 367; *Brook* v. *Hoar*, [1967] 3 All E. R. 295; *Duncan* v. *London Borough of Lambeth*, [1968] 1 All E. R. 84.

disability afflicts the person to whom the right originally accrued or any other person who claims through him (*l*).

On the death of a person under disability (as on the death of an infant), time begins to run from *the date of death*; and this is so even if the person in whom the right then vests is *also under disability* (*m*).

The rules as to disability apply to actions for the recovery of land as much as to other actions, but in the case of actions for the recovery of land an *absolute* time limit of *thirty* years from the date of accrual is imposed irrespective of the existence or continuance of disability (*n*).

In this context a person is conclusively presumed to be of unsound mind, (a) while he is liable to be detained or subject to guardianship under the Mental Health Act, 1959, (b) while he is receiving treatment as an inpatient in any hospital or nursing home within the meaning of that Act without being liable to be detained thereunder, being treatment which follows without any interval a period during which he was liable to be detained or subject to guardianship under that Act (*o*).

(*l*) Limitation Act, 1939, s. 22, proviso (a). See *Lafond* v. *Ruddock* (1853), 13 C. B. 813, 819; *per* MAULE, J., and *Garner* v. *Wingrove*, [1905] 2 Ch. 233. See also *Rhodes* v. *Smethurst* (1840), 6 M. & W. 351 (delay by reason of appointment of executor for defendant does not postpone running of time).

(*m*) Limitation Act, 1939, s. 22.

(*n*) *Ibid.*, proviso (c).

(*o*) *Ibid.*, s. 31 (3). As amended by the Mental Health Act, 1959 (Seventh Schedule). As to disability in relation to the Limitation Act, 1963, which makes allowance for it, see ss. 4 (3), 7 (2) (a).

Tort — 25.5.78

Definition and nature of tort: Conditions: Liability — absolute liability — Mens rea, negligence exemptions, immunities, Joint-Wrongdoer. Various liability. Devolution of right and liability. Trespass, dispossession, nuisance. Injuries to servitudes, Conversion and other injuries to chattels, Injuries to person. Injuries to domestic relations — Defamation, Intimidation — deceit and injurious falsehood. Liability for dangerous property. Wrongful

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